91-88

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL,
Petitioner,

v.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D. G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented for Review

1. Must political affiliation and/or support be the "sole basis" of a public employee's demotion to constitute a deprivation of his First Amendment rights of political belief and association, or need they only be a "substantial or motivating factor" in his demotion to constitute a deprivation?

2. Has a demoted civil servant been deprived of his First Amendment rights of political belief and association if his own political affiliation and/or support of a Democratic mayoral candidate is unrelated to the demotion decision which is made to create a position to reward his Republican replacement for the replacement's political affiliation and support of a Republican Mayor?

3. Is a demoted civil servant deprived of due process under the Fourteenth Amendment to the United States Constitution where two City Civil Service Commissioners, who cast the tying and deciding votes against him in a post-deprivation appeal hearing, are determined almost 5 years later not to have been impartial?

4. Are a demoted civil servants' due process rights under the Fourteenth Amendment to the United States Constitution violated by the civil service system that enables a Mayor who is being sued for having demoted a civil servant (1) to appoint the members to the Civil Service Commission who are not impartial after the date that an appeal has been filed with the Commission and where two of those Commissioners later cast tying and deciding votes on the appeal, (2) to delay the Commission's appeal hearing, (3) to alter Commission customs and practices, and (4) to utilize the City's Corporation Counsel to simultaneously represent the Mayor as a Defendant and the Commission as the administrative hearing agency?

5. Whether a civil servant was deprived of Procedural and Substantive due process under the Fourteenth Amendment to the United States Constitution where he was deprived of a liberty interest (from a stigmatization of his reputation) in connection with his demotion and/or where he was demoted for no lawful purpose.

[Note: Petitioner reserves the right to argue Question 6 in the event certiorari is granted on the above questions, but does not include Question 6 among the reasons for the grant of certiorari.]

6. Whether the Court erred in dismissing Petitioner's First Amendment and Due Process Claims and his 42 U.S.C. 1983 claims under *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL, Petitioner

v.

CITY AND COUNTY OF HONOLULU, et al., Respondents[1]

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Malcolm A. Sussel ("Sussel") respectfully prays that a Writ of Certiorari issue to review the Order and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit entered on December 6, 1990 together with the February 7, 1991 Order amending the Memorandum Opinion and the Judgment thereafter entered on May 9, 1991.

OPINIONS BELOW

The Order and Memorandum Opinion of the Court of Appeals For the Ninth Circuit entered on December 6, 1990 and its February 7, 1991 Order amending that Opinion are not published case opinions but are appended hereto as Appendices A and B, respectively. Appendix C contains the primary Decision of the United States District Court for the District of Hawaii entered on March 3, 1989 granting Defendants' Motions for Summary Judgment. Appendix D contains the District Court's April 21, 1989 Order Granting In Part and Denying In Part Plaintiff's and Defendants' Motions for Reconsideration. Appendix E is the Ninth Circuit's May 9, 1991 Judgment.

JURISDICTION

Invoking federal jurisdiction under the First and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. 1983, 28 U.S.C. 1343(a)(3), (4), and 28 U.S.C. 2201 and 2202, the Petitioner brought this suit in the United

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1 All parties in this proceeding are listed in the caption on the cover of this Petition.

States District Court for the District of Hawaii by filing his Complaint on December 15, 1986 in DC No. 86-1136.[2] On March 3, 1989 the District Court entered its Decision granting Defendants' Motions for Summary Judgment and for other relief on all of Petitioner's federal jurisdictional claims. On Petitioner's appeal, the Ninth Circuit affirmed the District Court with regard to its grant of summary judgment in favor of Defendants on all of Petitioner's federal jurisdictional claims when it entered its Order and Memorandum Opinion on December 6, 1990 together with its February 7, 1991 Order amending the Memorandum Opinion. A timely Petition for Rehearing was filed by Petitioner on or about February 20, 1991 and an Order denying that Petition was entered on March 7, 1991. The jurisdiction of this Court to review the December 6th and February 7th Orders and Memorandum Opinion of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment I, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech . . . the right of the people peaceably to assemble . . ."

Amendment XIV, United States Constitution, Section 1, Clause 2: ". . . nor shall any State deprive any person of . . . liberty, or property, without due process of law. . . ."

42 U.S.C. 1983:

"1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

A. Nature of The Case

Petitioner Malcolm A. Sussel ("Sussel") appeals from summary judgment granted in favor of his employer, the City, and his co-employees, Respondents Mayor Fasi, Managing Director Anderson, Civil Service Director Fukuda, and his

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2 A second Complaint (DC No. 88-00375) was filed by Plaintiff on May 4, 1988 in state court (and immediately removed to federal court by Respondents) on substantially the same claims after the pendent state claims in DC No. 86-1136 had been dismissed without prejudice in federal court. That 1988 dismissal order was vacated in 1988 by the same federal judge.

Replacement George Kekuna on his First and Fourteenth Amendment claims and his 42 U.S.C. 1983 claims. Upon retiring in 1979 as a Colonel in the U.S. Army in which he had been promoted during 37 years from a private, Sussel obtained a job with the Respondent City and County of Honolulu's Oahu Civil Defense Agency ("OCDA") as a Communications Officer. He rose to the civil service position of Assistant Administrator and Operations Officer, which he relinquished in 1982 when he was appointed by Mayor Eileen Anderson (a Democrat) as Administrator of OCDA after being selected under open competitive civil service procedures.

Although his performance as Administrator was excellent, he was replaced on January 2, 1985 when the newly-elected Republican Mayor Fasi took office and appointed a Republican political patronage replacement for Sussel. Sussel was neither a Republican nor a supporter of Mayor Fasi. In doing so, the Mayor ignored Sussel's civil service rights by removing him without cause and without a prior 10-day written notice specifying the cause as required by the City Civil Service Law. The Mayor conspired with the City's Managing Director, the Civil Service Director, and Sussel's Replacement to replace Sussel to fulfill a political commitment. The conspiracy was implemented by reducing Sussel to a clerical role in OCDA but keeping his salary at the same level initially, and then harassing him in the hope that he would resign.

Sussel has persevered for over 6 years in attempting to recover his job. He initially appealed to the City Civil Service Commission ("Commission") which delayed his case from a 60-day period to one-year when it ruled 3 to 2 against him that he was not a civil service employee. He appealed to a state court which reversed that decision only to have the case remanded to the Commission, which then failed to hold hearings for another one year and five months during which it was discovered that the Commission had been biased since 1985 in favor of the Mayor who had stacked two members on the Commission in 1985 and who had a long- standing political and business relationship with the Chairman. Having been unable to obtain a prompt, fair hearing by an impartial Commission, Sussel sought to present all of his claims to an impartial jury in federal court in order to obtain reinstatement and compensation for lost salary and for his pain and suffering endured as a result of the exacerbation of his myofascial pain syndrome (which originated in part from four war wounds and injuries suffered in three wars) from the emotional stress due to the Respondents' political machinations.

Sussel alleged 17 separate claims including the following ones which were dismissed or denied by summary judgment by the District Court: (1) Deprivation of his civil rights in violation of 42 U.S.C. 1983 and deprivation of his Fourteenth Amendment rights to substantive and procedural due process and to freedom of political beliefs and association under the First Amendment; (2) Direct claims under the U.S. Constitution for violations of substantive and procedural due process, equal protection, and freedom of political beliefs and association; (4) A

conspiracy to violate his civil rights; (6) Breach of an employment agreement with the City; (7) Tortious breach of the covenants of good faith in his employment agreement; (9) Intentional and/or negligent misrepresentations in his hiring and removal; (10) Equitable estoppel, implied contract, and wrongful removal; (11) Intentional interference with contract relations; (12) Defamation; (13) Conspiracy to commit torts, wrongful conduct, and breach of contract. ER 1, 2ER 1-Ex.B.[3]

The case was scheduled for trial four times, the most recent of which was for March 14, 1989. The Court's March 3, 1989 Decision (Appendix C hereto and also herein referred to as "ER 535" at pages 50 to 53) and April 21, 1989 Order (Appendix D, ER 573) dismissed or granted summary judgment against Sussel on all of his claims in DC No. 86-1136 and on Claims 1, 2, 4, 6, 7, 9, 10, 11, 12, and part of 13 in DC No. 88-00375. The remaining pendent state claims in DC No. 88-00375 were remanded to State Court. ER 535-53.

B. Facts Pertinent to Petitioner's Questions

1. *Petitioner Was Removed For Political Reasons*

In February 1982, the City published an announcement for the Civil Service position of the Civil Defense Administrator. Sussel applied and was tested and interviewed by the City. Sussel was selected from the candidates who applied, was then appointed by Mayor Anderson on June 2, 1982, and approved by the State Director of Civil Defense. He relinquished the civil service position of Assistant Administrator and Operations Officer of OCDA when he accepted the Administrator's job. On December 2, 1982, he completed his probationary six-month period and was evaluated by the Managing Director who graded him "excellent" on all Performance Factors. In November 1984 he was again graded "excellent" on all Performance Factors.

On January 2, 1985, Fasi was sworn in as Mayor, D.G. "Andy" Anderson (who is unrelated to former Mayor Eileen Anderson) as the City's Managing Director, Fukuda as the City's Director of Civil Service, and Kekuna was sworn in as "Deputy Director-Designate OCDA" with the understanding that he had Sussel's powers to head OCDA. On January 7, 1985, Andy Anderson as Managing Director issued a Memo to all employees of OCDA to look for direction and guidance of OCDA from Kekuna at all times. On January 7, 1985, Kekuna informed the staff of OCDA that he had been appointed by the Mayor to take over and of how he would conduct certain matters. He told Sussel to turn over the official OCDA car. On January 8, 1985, Kekuna took over Sussel's office. On January 11, 1985, Kekuna issued instructions to Sussel and deprived him of additional powers.

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3 ER refers to the Excerpts of Record in DC 86-1136 and filed in the Ninth Circuit with Petitioner's appeal. 2ER refers to the Excerpts of Record in DC 88-00375 also filed in the Ninth Circuit. These two cases were previously consolidated in the District Court.

According to Anderson, "paper shuffling" was thereafter handled by the Civil Service Director to make the removal of Sussel and his replacement by Kekuna "legal." Anderson left it up to Director Fukuda to prepare the necessary paperwork. The paperwork consisted of a Position Description for Sussel which showed that he no longer had the duties that were vested in the Administrator under 6-104 of the City Charter. Addendum A-4 to Appellant's Opening Brief filed in the Ninth Circuit. It also included a Position Description for Kekuna, which showed that all of the Administrator's powers, duties, responsibilities, and authority were now assigned to Kekuna.

Mayor Fasi and Anderson relied on Director Fukuda to handle the processing of the change of Sussel's duties and powers. Fukuda testified that Sussel's "demotion" was due to *nondisciplinary* and *involuntary reasons*. As a result of his removal and the downgrade of his pay grade from EM07 to SR21 (9 pay levels), Sussel is not now receiving the salary raises that he would have received if he had remained as Administrator. He has been denied over $17,000 in pay raises.

Sussel was never given a prior 10-day written notice of his removal or demotion specifying the reasons for his demotion as required by Rule 10.3.c of the City's Civil Service Rules. Addendum A-5 to Appellant's Opening Brief filed on October 10, 1989 in the Ninth Circuit (all such references to Addendum "A-__" are to said Brief unless noted otherwise).

No notice specifying the reasons for his demotion was given because the City had no legitimate reason. The real reason for the demotion was to satisfy a political commitment from Mayor Fasi to Kekuna.

Sussel was demoted from the Civil Service position of Administrator of OCDA to make room for Kekuna to satisfy a political *commitment* from Mayor Fasi to his political supporter Kekuna. By their own admissions Respondents have ruled out incompetence as a reason for Sussel's removal. Addendum A-1 to Appellant's Petition for Rehearing and Suggestion For Rehearing In Banc filed August 21, 1990 in the Ninth Circuit (relating to admissions of Respondent Fasi's counsel made during oral argument on the appeal in this case on April 9, 1990). More importantly, Fasi's new Director of the Department of Civil Service, Respondent Fukuda, admitted that Sussel was demoted for *nondisciplinary* and involuntary *reasons*. Having ruled out both *disciplinary reasons* and *incompetence* for his demotion, Respondents' demotion of Sussel was based on political patronage reasons according to the following facts which must be construed most favorably for Sussel on the Summary Judgment motions. It was improper for the Ninth Circuit Court to attempt to weigh the facts or assess credibility to see if Sussel had presented "sufficient probative evidence" that he was demoted only because of *his* political affiliation, especially where the District Court made no findings of fact that Respondents had carried their initial burden of showing the absence of any genuine issue of fact or that any reason other than political

patronage was the cause of Sussel's demotion.

Fasi, as a Democrat, served and was elected as Mayor of Honolulu for three consecutive terms from 1969 through 1981. In November, 1980 he was defeated by Democrat Eileen Anderson who served as Mayor from January 2, 1981 to January 2, 1985. Fasi switched political parties to the Republican Party (the waning, minority party in the State of Hawaii) in 1984.[4] As a Republican he ran for and was elected Mayor for a 4th term in November 1984.

Sussel was not a Republican and he supported Democrat Eileen Anderson in 1984.

Mayor-elect Fasi on December 13, 1984 publicly announced the appointment of his new cabinet political appointees, including Respondent Kekuna, who was to get Sussel's job. Kekuna supported Fasi in both the 1984 and 1988 campaigns and he supported D. G. Anderson in his 1986 gubernatorial campaign. Sussel, a supporter of the Democratic candidate, was ousted to make way for Fasi's Republican supporter, Kekuna.

During the 1984 Mayoral campaign, *Kekuna was affiliated with the Republican Party as its Mililani District Chairman.* As such he arranged for Fasi supporters to regularly wave street campaign signs (which is the primary method of campaigning on a daily basis in Hawaii where posted signs and billboards were illegal in 1985). Kekuna also held such signs for Fasi in 1984. Kekuna organized a political meeting at his home in 1984 for the public to meet Fasi, who attended it. Kekuna made monetary contributions in 1985 for Fasi's campaign. Since 1984, Kekuna has helped conduct and arrange 10 political "pancake breakfasts" for D. G. Anderson's 1986 gubernatorial campaign.

Respondent Kekuna admits that on December 13, 1984 Fasi made a *commitment* to name him as head of OCDA. Respondent Anderson later confirmed the commitment. On December 15, 1984, Sussel, in response to Fasi's public announcement of all new prospective cabinet appointees, informed Fasi that he was a civil service employee and informed Fasi to leave him in his position. Fasi declined to do so even though he said that the present Civil Service Director did not agree with Fasi's belief that he could appoint whoever he wanted. Fasi cavalierly said, "... we'll see what the new one says." Fasi informed Sussel on December 15, 1984 that he had "made a *commitment*" to Kekuna. Sussel's union attorney informed Fasi in writing on December 21, 1984 that Sussel could not be discharged without proper cause. On November 30, 1984 Sussel had been graded "excellent" on all Performance Factors by the Managing Director.

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4 Respondent D.G. Anderson asked Fasi to become a Republican in 1984 since he felt it was the only way for both Fasi and the Republican party (of which Anderson was then a Republican National Committeeman) to win in the mayoral election. D.G. Anderson supported Fasi with volunteer work on his campaign committee and with a $2,000 donation. On January 2, 1985 Fasi appointed D.G. Anderson as his new City Managing Director (the City's second highest position).

On January 2, 1985, Fasi was sworn in as Mayor, Anderson as the City's Managing Director, Respondent Fukuda as the City's Director of Civil Service, and Kekuna as "Deputy Director-Designate OCDA" with the understanding that he had all of Sussel's powers to head OCDA. On January 7, 1985, Anderson issued a Memo to all employees of OCDA to look for direction and guidance of OCDA from Kekuna at all times. On January 7, 1985, Kekuna informed the staff of OCDA that he had been appointed by the Mayor to take over and of how he would conduct certain matters. He told Sussel to turn over the official OCDA car. On January 8, 1985, Kekuna took over Sussel's office. On January 11, 1985, Kekuna issued instructions to Sussel and deprived him of additional powers.

On January 2, 1985 D. G. Anderson informed Sussel that Mayor Fasi intended to proceed forward with his "*commitment*" to place Kekuna as head of OCDA. D. G. Anderson said Kekuna started exercising the duties and responsibilities assigned to Sussel as the Administrator of OCDA under Section 6-104 of the City Charter on January 2, 1985. Addendum A-4. Kekuna told Sussel on January 7, 1985 that Managing Director Anderson wants him down there at OCDA and the "mayor wants his tracks covered completely." D. G. Anderson was acting under the instructions of Mayor Fasi.

On January 11, 1985 Kekuna informed Sussel that (1) he was no longer to be the spokesman for OCDA and (2) he was not to respond to night emergencies for OCDA. Sussel has been relegated to the lowest subservient clerical role in OCDA; has been deprived essentially of all substantive duties; and has been subjected to emotional distress and pain and suffering as a result thereof.

Fasi's commitment to Kekuna was made as part of Fasi's policy to replace all of the cabinet heads. In light of Fasi's admitted *commitment* to Kekuna and Sussel's excellent performance as Administrator, the inference to be drawn in Sussel's favor is strong on a summary judgment motion that Sussel's demotion and replacement was a political reward for Kekuna's support as a Republican Party official of Fasi in 1984.

The Managing Director admitted that the substitution was a *policy* that he implemented for the Mayor. Fasi was a Republican, as was Kekuna. The replacement of Sussel with Kekuna, who had not been selected under civil service procedures and who was paid $10,000 a year more than Sussel had been paid for performing essentially the same job, was a political patronage appointment. Fasi said he wanted his appointee in as head of OCDA and he didn't care how the job got done. He disregarded Sussel's civil service status. Sussel's salary was retained at its former rate although his pay grade was reduced. Thus, the City is paying for two people now to do one job where it previously paid less money to Sussel than it is now paying Kekuna. Sussel had lost over $17,000 in pay raises by March 1989 due to his downgrade from an EM07 to SR21.

Fasi even stated in November 1984 that *he might give the edge to* those *who supported him* in his campaign in selecting new cabinet heads. In December 1984

after Fasi announced that he would appoint Kekuna to this position, the 1984 Civil Service Director Kunioka told Fasi that Sussel was a civil service employee. D. G. Anderson said that he "didn't really care" if Sussel was a civil servant since they had set out to fill the appointments. Fasi told Anderson and the others to find a way to get his appointee into the position and how they got him in was not important as long as they got the job done. Fasi said they carried out his instructions. Anderson repeatedly stated that he was carrying out the "policy" of the Mayor.

Fasi accomplished his goal by demoting Sussel and transferring all of his powers, duties, and authority (as set forth in Section 6-104 of the City Charter) to Kekuna. Addendum A-4. The commitment was fulfilled and non-Republican Sussel was removed from his civil service position as Administrator and replaced with a non-civil service Republican appointee who had supported Fasi. Construing these facts in the light most favorable to Sussel, the substantial or motivating factor for his demotion was based on political patronage reasons and summary judgment on his First Amendment claim and on his 42 U.S.C. 1983 claim should have been reversed for a jury to weigh the evidence at trial.

2. *Petitioner Has Long Been Deprived Of Due Process By The City's Biased Civil Service Commissioners*

D. G. Anderson informed a media representative in early 1985 that "we intend to win in the Civil Service Commission; we'll drag it out until Sussel and HGEA can't afford to continue and will quit."

On January 25, 1985 Sussel appealed his demotion to the Commission, which did not render a written decision until a year later on January 7, 1986. It decided (3 to 2 against him) that Sussel was not a civil service employee and it had no jurisdiction to hear his case. He appealed to the Hawaii State court which reversed the Commission on May 22, 1987 and found that he was a civil service employee and remanded the case to the Commission for further proceedings.

Respondents and the Commission originally delayed a hearing on Sussel's case from 1/25/85 until 10/9/85. It then delayed a written decision until January 7, 1986, contrary to the Commission's Rule 5.4.r that requires it to render a decision within 60 days from filing his appeal on January 25, 1985. Addendum A-6. Sussel then encountered over one year and five months of additional delays from the Commission after the entry of the May 22, 1987 Order of the state Court which remanded the case back to the Commission for further proceedings. Despite Sussel's prompt request by letter dated June 9, 1987 to Respondents' attorney that the Commission reschedule his remanded case, no further evidentiary hearings had been held by the Commission at the time of the appeal to the Ninth Circuit. Commissioner Dias was unable to explain why the Commission did not schedule a hearing on the remand.

The five-member Commission's January 7, 1986 Decision against Sussel was by a three to two vote. Of the two Commissioners who voted in Sussel's favor,

at least one (Salsbury) of them is no longer a Commissioner since her term has since expired and she was not reappointed by Mayor Fasi who criticized her in a December 26, 1985 letter for voting for Sussel. Mayor Fasi's blatant letters of intimidation to these two Commissioners were designed to influence the two dissenting Commissioners after their vote but prior to the entry of the Commission's January 7, 1986 written Decision. Failing to influence Salsbury, he simply did not reappoint her.

Of the three Commissioners (Tacazon, Dias, and Chairman Miyagi), who voted against Sussel, Tacazon and Dias were appointed to the Commission by Mayor Fasi in 1985 after Sussel filed his appeal to the Commission but before his appeal hearing commenced. Chairman Miyagi had been appointed several times to the Commission in the past by Mayor Fasi. Mayor Fasi with the help of the Corporation Counsel (who represented Fasi, the City, and the Commission) delayed the appeal hearing for 10 months and stacked the Commission with these two appointees (Dias and Tacazon) during the delay.

Although the City Charter prohibits political discrimination and influence in civil service matters, Commissioner Dias refused to consider this issue presented by Sussel in the October 1985 appeal hearing. Sections 6-302, 6-312.1 of Charter, Addendum A-4. Dias said that he did not intend to hear any "political laundry" or "political differences" aired at the hearing. The Commission's January 7, 1986 Decision did not even address the issue of whether there had been political discrimination. By not deciding that issue, the biased Commissioners and their Corporation Counsel ensured the protraction of the appeal hearing by compelling a remand even if the state court reversed its decision on the civil service issue.

A state court judge ruled on October 27, 1988 that Dias was *actually biased* against Sussel in 1985 and should be disqualified from hearing the remanded Sussel case. The Hawaii Supreme Court affirmed that decision on December 19, 1989. Addendum A-11 to Appellant's January 25, 1990 Answering/Reply Brief.

Chairman Miyagi is a personal friend of Mayor Fasi and Respondent Fukuda. He made political contributions in 1984 and in 1987 to Fasi by purchasing $2,000 in fundraising tickets. He also purchased fundraising tickets for Anderson for his gubernatorial campaign in 1986. He is a political supporter of both of those Respondents. He would have to rule against both of them in order to find in favor of Sussel on remand to the Commission. He is also biased for the City and Mayor Fasi because he is the president and 70% stockholder of MTL, Inc., a company that ran the City bus system since 1970 by negotiated contracts (non-bid) with the City. On October 27, 1988 a state judge ruled that *Miyagi had an "appearance of impropriety"* and suggested that he seriously consider disqualifying himself. He did not do so. Upon appeal to the Hawaii Supreme Court by Sussel of the lower court's decision not to disqualify Miyagi, the Hawaii Supreme Court on November 9, 1988 *stayed any further Commission proceed-*

ings pending the outcome of its decision on whether Miyagi should also be disqualified under the appearance of impropriety standard. The Hawaii Supreme Court disqualified him from further participation in Sussel's remanded appeal on December 19, 1989. Addendum A-11.

The Commission does not have the authority to address Sussel's non-civil service claims. Section 6-310 of the City Charter, Addendum A-4. The Commission says that it does not even have the authority to reinstate Sussel and to reassign his duties. The Commission did not even know what matters it was going to address on the remanded case and it was in an obvious state of uncertainty as to what authority it has to hear his remanded civil service claims. Judge Ideman denied abstention in this case and found that the: "Commission cannot provide the full relief that the plaintiff is seeking." Judge Keep had earlier agreed that she would not extend a limited stay of this case for the Commission to render a decision since she concluded that it could not adequately address Sussel's various claims.

Until January 1985 when Fasi was sworn in as Mayor, the Commission had a long-standing practice of being legally represented by the State Attorney General's Office at Commission hearings. Section 76-47 Hawaii Revised Statutes; Addendum A-2. Fasi's administration stopped that practice in early 1985 and required that a City Corporation Counsel advise the Commission, even though this created a clear conflict of interest since the Corporation Counsel's office was also defending the Respondents in front of the Commission.

On April 12, 1989, a state court found that, "... where there is a tribunal that is being biased by the advice of a biased legal counsel the Complainant in the matter is irreparably damaged. The Corporation Counsel is biased herein because of a conflict of interest in representing both the Commission and the Respondent appearing before the Commission." The state court enjoined the Commission and its members from using the Corporation Counsel in any proceedings in connection with Sussel's remanded case. The same Corporation Counsel had represented both the Commission and the Respondents in Sussel's initial appeal hearing in 1985 over Sussel's objections.

The policy behind the City's Civil Service system requires that the process be "free from coercive political influences" and that the selection and review process be an impartial one. Section 6-302 of the City Charter, Addendum A-4. It is the City's policy that all appointed officers (including the Civil Service Commission members) ". . . shall demonstrate by their example the highest standards of ethical conduct. . . . and shall faithfully discharge the duties of their office regardless of personal considerations." 11-101 of Charter, Addendum A-4. Section 11-103 of the Charter requires the disclosure by an appointed officer or employee of any "... interest as might reasonably tend to create a conflict with the public interest. . . ." Section 11-104 of the Charter requires that appointed officers shall not use their official positions to secure advantage to themselves. Addendum A-4.

The inference on summary judgment is strong that the two Commissioners who were not impartial had an interest or stake in insuring that Sussel lost or delayed the remand of his appeal to the Commission in order to promote their own biased purposes in supporting the Mayor's or the City's defenses or goals. Sussel has long been deprived of substantive and procedural due process by these biased Commissioners who delayed his case almost an additional 2 1/2 years (aside from the time that was spent in appeals at the state level).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Causation Test under the First Amendment Which Compromises the "Sole Basis" Test With The "Substantial Factor" Test In This Case Involving a Political Demotion of a Civil Servant Raises an Important and Unresolved Question In Post-*Rutan* Cases Which Conflicts With Decisions of Other Courts of Appeals

Why should a public employee be entitled to a claim for deprivation of his First Amendment rights when the exercise of his freedom of speech was a substantial or motivating factor in his demotion, but he is not so entitled when the exercise of his political beliefs and association were the substantial or motivating factor for his demotion but not the sole basis for his demotion? The Ninth Circuit appeared to be confused as to the proper causation standard to be applied in this case involving a politically-motivated demotion.

Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484, 97 S.Ct. 568 (1977) held in a First Amendment freedom of speech case that initially the burden was properly placed upon a claimant to show that his conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the adverse employment decision taken against him. Upon satisfying that burden, the district court then is required to determine whether the employer has shown by a preponderance of the evidence that it would have reached the same employment decision even in the absence of the protected conduct.

The *Mt. Healthy* causation test has not been applied by this Court in First Amendment cases involving adverse employment decisions based on political affiliation or support. The causation test that has been applied in *Elrod vs. Burns*, 427 U.S. 347, 349 (1976); *Branti vs. Finkel*, 445 U.S. 507, 517 (1980); and *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2739 (1990) has been to determine whether a public employee has been discharged or had an adverse employment decision taken against him "solely because" of his partisan political affiliation, non-affiliation or support. It is not clear whether the Ninth Circuit intended the *Mt. Healthy* test to apply only in employment cases involving freedom of speech and not freedom of political belief and association.

Sussel claimed a deprivation of his First Amendment rights of freedom of speech, political beliefs and association because he was removed for political patronage reasons. 2ER 1-Ex.B(p.17, 21). Without ever addressing his First Amendment claims, the District Court granted summary judgment on portions of Sussel's First and Second Claims (Appendix C at page 48a; ER 535-51) and dismissed all remaining claims in DC 86-1136 without prejudice. ER 535-46, 53. The Court remanded the remaining pendent state claims in DC 88-00375 and dismissed all federal claims. ER 535-48, 53; ER 573-5, 7, 8. Although Sussel had raised the First Amendment claims and moved for reconsideration of their dismissal, the District Court upheld its dismissal without comment on these claims. ER 573-p.7, 8.

When the Ninth Circuit issued its original Memorandum Opinion in this case on August 7, 1990, it contained no reference whatsoever to Findings of Fact, Conclusions of Law, or a Decision with respect to his claim for deprivation of First Amendment rights for a politically-motivated demotion. After Petitioner filed a timely Petition for Rehearing on August 21, 1990, the Ninth Circuit issued on December 6, 1990 its Order withdrawing the August 7, 1990 Memorandum disposition and filed in its stead the current December 6, 1990 Memorandum Opinion which contained two changes to its earlier Opinion.

One of those changes vacated in part and remanded in part the district court's decision with respect to pendent state claims upon which Summary Judgment had been granted against Petitioner. The other change involved, adding a sentence relating to Petitioner's political association claim.

In its December 6, 1990 Memorandum Opinion, the Ninth Circuit applied the *Mt. Healthy* test in addressing Petitioner's freedom of speech First Amendment claim as it had done in its August 7, 1990 Opinion. It then applied the *Elrod, Branti, Rutan* test with respect to Petitioner's political association claim by adding the following sentence to the third paragraph on page 9a:

> ". . . Further, Sussel has failed to present sufficient probative evidence that he was demoted *solely on the basis* of *his* political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990)." (emphasis added)

Appendix A at page 9a.

Thus, the Ninth Circuit's review of the evidence was initially based upon a causation test under which it required that Petitioner show that the demotion was solely based on his political affiliation. This strict test would prevent Sussel from proving that the substantial or motivating factor in his demotion was his non-affiliation with the Republican Party, his lack of support from that Party, and his replacement's affiliation and support of that party and/or the Republican Mayor.

In response to Petitioner's second Petition For Rehearing filed on December 21, 1990, the Ninth Circuit amended its December 6, 1990 Opinion and stated that:

". . . Further, Sussel has failed to present sufficient probative evidence that he was demoted *because of* his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2735 (1990.)" (emphasis added) Appendix B hereto.

The Ninth Circuit did not expressly state that Petitioner had failed to allege facts to support a claim that the exercise of his First Amendment rights of political belief and association was a substantial or motivating factor for his demotion. Nor did it reach the second level of inquiry under *Mt. Healthy* as to whether Petitioner would have been demoted in any event if his replacement had not been a supporter of and affiliated with the Republican Party and the Republican Mayor. No Findings of Fact or independent review of any evidence with respect to the politically-motivated demotion is contained in the Ninth Circuit's Opinion.

It did not apply the *Mt. Healthy* test. Nor did it finally apply the *Elrod* sole cause test. Since no Findings of Fact were entered by the Ninth Circuit after it changed its applicable test, it cannot be determined from its Opinion whether it conducted an independent review on the whole record as it is permitted to do in order to determine what the substantial or motivating factor was in Petitioner's demotion if it was not his non-affiliation with the Republican Party and his replacements affiliation and support of that party and its Republican Mayor. *Bose Corp. vs. Consumer Union of United States, Inc.* 466 U.S. 485 (1984). Since Petitioner is a civil servant, the Ninth Circuit would have to find some type of "just cause" under the Civil Service laws in order to conclude that political motivation was not the substantial or motivating factor for the demotion.

However, since it is admitted by Respondents that the demotion was not due to incompetence and Petitioner was performing at an excellent level one month before his demotion, the Ninth Circuit's failure to answer the second inquiry under *Mt. Healthy* in the affirmative that he would have been demoted even in the absence of the protected conduct, shows that the Ninth Circuit encountered confusion as to which test was applicable. If it intended to apply the *Mt. Healthy* test it did not adequately and fully apply it. The Ninth Circuit's second amended opinion on this point continues to focus only upon Petitioner's political affiliation and not on his non-affiliation with the Republican Party, his support of the Democratic mayor, and most importantly, his replacement's affiliation with and support of the Republican Party and the Republican Mayor (which was recognized in *Elrod* as an improper basis for discharge). 427 U.S. at 350-351.

For consistency, the test should clearly be that set forth in *Mt. Healthy*. If it had been applied in this case, the following facts when viewed in the light most favorable to Petitioner establish that the substantial or motivating factor in Petitioner's demotion was his non-affiliation and support of the Republican Party and its Mayor and his replacement's affiliation and support of that Party and its Mayor: (1) the Mayor was a Republican, (2) Sussel's replacement was a

Republican member, (3) Sussel's replacement was a Republican Party Chairman, (4) Sussel's replacement had supported Mayor Fasi in the 1984 election campaign, (5) Sussel was not fired, but instead demoted with his salary being kept at the same level as previously, (6) he was replaced by Republican Mayor Fasi's supporter whereas he had supported Democratic Mayor Eileen Anderson, (7) his replacement was paid more money for performing essentially the same job that Sussel had performed, (8) Sussel's job performance had been excellent one month before his demotion, (9) the City's Personnel Director admitted that Sussel's removal was not due to disciplinary reasons and was involuntary, (10) Mayor Fasi's attorney admitted in oral argument in the Ninth Circuit that he was not removed for incompetence, (11) Mayor Fasi pledged a *commitment* to Kekuna to give him Sussel's job as Administrator of OCDA, (12) Fasi's attorney also admitted that Sussel "was removed as part of a new administration coming in" and "[t]o the extent that when a president selects his own cabinet and that's a political reason, I guess you could equate that in this particular situation. . . .", and (13) Sussel had informed Mayor Fasi that he was a civil servant and could not be removed under the City Civil Service laws without just cause.

After Mayor Fasi changed parties and ran as a Republican in 1984, he received support from the Republican District Chairman, Kekuna, who held a political get-together at his house for Fasi. Kekuna also held road signs supporting Fasi. He provided monetary contributions to Fasi. Since 1984, he has helped conduct and arrange political pancake breakfasts for re-election efforts of Fasi. Kekuna was selected with the other patronage appointees who were publicly announced in December 1984 by Fasi. Sussel was not a Republican and he supported Democrat Eileen Anderson in 1984.

In 1984 Fasi and Anderson entered into a political agreement to support one another as Republicans with Anderson to support Fasi in the 1984 mayoral campaign. Fasi then supported Anderson in the 1986 gubernatorial campaign. Anderson initiated the request to Fasi to become a Republican in 1984 since he felt it was the only way for both Fasi and the Republican party (of which Anderson was then a Republican National Committeeman) to win in the mayoral election. They formed the mutual alliance and Anderson supported Fasi with volunteer work and a $2,000 donation. Kekuna supported both Fasi in the 1984 and 1988 campaigns and Anderson in the 1986 campaign. The agreements for political support and patronage which included the participation of Kekuna resulted in the exclusion of Sussel.

Fasi testified he might give the edge to those who supported him. He expected Fukuda and Anderson to figure out how he could "get control" to get his appointee in as head of OCDA. He accomplished that by demoting Sussel and transferring his authority to Kekuna in violation of multiple City and State laws of which he was well aware. Kekuna, Fasi, and Anderson each stated that a "commitment" was made by Fasi to Kekuna and that Fasi intended to pursue it.

The commitment was fulfilled, the conspiracy was implemented, and non-Republican Sussel was removed from his civil service position as Administrator and replaced with a non-civil service Republican appointee contrary to 6-104, 6-302, 6-312.1 of the City Charter, 128-13(1) H.R.S., and Article XVI, Section 1 and Article I, Section 4 of the Hawaii Constitution. Addendum A-4, 7, 8.

Other circuits have applied the *Mt. Healthy* substantial or motivating factor causation test in political demotion cases since *Rutan* was decided. *E.g. Green v. St. Louis Housing Authority*, 911 F.2d 65, 70 (8th Cir. 1990); *Laidley v. McClain*, 914 F.2d 1386, 1392 (10th Cir. 1990) (reviewing the record and drawing all inferences in plaintiff's favor, a genuine issue of fact existed as to whether a public employee's support of a losing candidate in a recent election was a substantial or motivating factor in her termination by the newly-elected District Attorney). Other courts, like the Ninth Circuit in this case, have shown less willingness to embrace the *Mt. Healthy* test in political deprivation employment cases. *See e.g., Neely vs. Mangum*, 396 S.E.2d. 160, 164 (W.Va. 1990); *Caraballo vs. Roman Hernandez*, 744 F. Supp. 389, 392 (D. Puerto Rico 1990).

Although the Ninth Circuit amended its Opinion on February 7, 1991 and deleted the words "solely on the basis", it did not recite any analysis or review of the evidence. Appendix B. Nor did it state that the *Mt. Healthy* test was applicable in *Rutan* political association demotion cases. Thus, it appears to be applying some type of hybrid or compromise of the two tests when it settled on the words "because of". The application of the correct test is an important question that should be clarified by this Court so that the confusion between the Circuits and State Supreme Courts can be avoided.

Even under the more stringent "sole basis" test (if that is the correct standard in post-*Rutan* cases), Sussel was deprived of his First Amendment rights since he was removed from his position solely because of political affiliation and support. Construing the facts in the light most favorable to Sussel, summary judgment should have been denied. The existence of his First Amendment claims alone established federal jurisdiction, thereby rendering the dismissal of DC 86- 1136 and the remand of DC 88-00375 erroneous. Dismissal under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986) is not applicable to First Amendment deprivation cases.

Respondent Fasi admitted through his counsel in oral argument in this case on April 9, 1990 that Sussel was removed for a "political reason" in this particular situation and not for incompetence.

> "JUDGE PREGERSON: If he were incompetent sufficient to fire him, why move him to another position and pay him the same amount of money?
>
> MR. NAKASHIMA: Well, Your Honor, the issue of incompetence, I think it is clear that *he was not removed from his position because of incompetence*. We have not said that.

JUDGE PREGERSON: *Why was he removed?*

MR. NAKASHIMA: Well, *this was a situation where the mayor*, the committee, the selection committee, had felt that because —*It was a situation where people were coming in. There's a new administration coming in.*

JUDGE PREGERSON: *So he was removed for political reasons.*

MR. NAKASHIMA: Well, *he was removed as part of a new administration coming in.* Mr. Sussel —

JUDGE PREGERSON: *And that's not for a political reason; is that what you're saying?*

MR. NAKASHIMA: Well, *Mr. Sussel was part of the cabinet from the previous administration. To the extent that when a president selects his own cabinet and that's a political reason, I guess you could equate that in this particular situation.* . . . " (emphasis added) Addendum A-1 to Appellant's Petition for Rehearing filed 12/21/90.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court held that the practice of political patronage dismissals, where there is a wholesale replacement of cabinet-level public employees (like this case), violates the First Amendment protections of freedom of belief and association. 96 S.Ct. at 2689. It found no justification for patronage dismissals.

> "... The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. . . ." 96 S.Ct. at 2685.

It concluded that "... patronage dismissals severely restrict political belief and association . . . ." 96 S.Ct. at 2689

After the April 9, 1990 oral argument on this appeal, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2739 (1990) held:

> "We hold that the rule of Elrod and Branti extends to promotions, transfer, recall, and hiring decisions based on party affiliation and support . . . ." (emphasis added).

The Supreme Court also stated:

> "We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. . . ." Id. at 2737. (emphasis added)

Thus, the decision to demote Sussel (a) *if based on* his lack of or failure to affiliate with or support the Republican Party and its mayoral candidate or (b) *if based on* his replacement's (Kekuna's) political affiliation with or support from or of that Party and its mayoral candidate, would be irreconcilable with the First Amendment. Sussel neither supported nor was affiliated with that party or its political candidate Fasi whereas Kekuna was affiliated with and a supporter of both.

Sussel's removal as part of a wholesale replacement of former Democratic Mayor Eileen Anderson's administration when Republican Mayor Fasi took office in 1985 violates Sussel's First Amendment rights of belief and association under either the *Elrod* or *Mt. Healthy* test, whichever is applicable. Since Republican Fasi has judicially admitted through counsel that Sussel's removal (and replacement by a non-civil service Republican District Chairman) was *not for incompetence* but was solely pursuant to a *wholesale replacement* of the former Democratic mayor's *cabinet*, summary judgment on this claim and, in turn, on the 42 U.S.C. Section 1983 claim must be reversed.

In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court denied defendant's summary judgment where a college refused to renew plaintiff's teaching contract as a reprisal for his exercise of constitutionally protected speech in publicly criticizing his superiors on matters of public concern. Sussel, as Administrator, delivered a letter on January 2, 1985 to Mayor Fasi (immediately after he was sworn in) outlining areas of jeopardy to the public safety on civil defense matters. On January 7, 1985, Anderson issued a memo purportedly using Sussel's protected January 2, 1985 letter as a basis for his removal. On January 7th Anderson stated to the press that the conflict between state and City Civil Defense (stated in Sussel's 1/2/85 letter) was "the main reason Fasi wanted Sussel out" whereas, he said on January 2nd that Sussel could keep his title, salary, and office. Anderson later denied that the City/State issue had anything to do with Sussel's ouster. Sussel exercised his right of freedom of speech in communicating a matter of public concern to Mayor Fasi on his first day in office. Fasi and Anderson's inconsistent effort to cover up Fasi's commitment to Kekuna and to justify Sussel's removal based on that letter raises a genuine issues of material fact if not under the freedom of speech clause of the First Amendment, then under the political association clause.

The Ninth Circuit stated in its Opinion that the timing of this letter being written several weeks after Fasi announced his intention to place Kekuna in the management position at OCDA shows that his exercise of his freedom of speech in writing the letter was not a substantial or motivating cause in his demotion. Appendix A (p.9a). Assuming, arguendo, the Ninth Circuit is correct on this finding, it evinces the extent to which the Mayor and his managing director would go to try to dream up reasons to justify his removal in order to cover up the commitment to Kekuna. The correct causation test to be applied in political

motivation cases subsequent to *Rutan* should be clarified by this court so that inconsistencies are eliminated and the facts of this case can be applied to the correct standard.

II. Petitioner Was Deprived of Due Process By Two Biased Civil Service Commissioners Without Whose Votes Petitioner Would Have Won

Due process requires that a party even in administrative hearings receive a fair hearing by a fair tribunal. *Gibson v. Berryhill*, 411 U.S. 564, 579, 36 L.Ed.2d 488, 93 S. Ct. 1689 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L.Ed.2d 287, 90 S. Ct. 1011 (1970); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955);

The Ninth Circuit stated that,

> "... Sussel also has an established post-deprivation procedure, with which he is familiar; that Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process...." Appendix A (p.9a)

The Ninth Circuit's Opinion is in direct conflict with the above authorities since a post-deprivation procedure before biased Commissioners necessarily constitutes a violation of due process, especially in cases such as this before an administrative agency where the result would be reversed if the biased commissioners are removed from the count. The fact that there may be an appeal procedure from the Commission proceedings does not render the commission proceedings constitutionally acceptable where there are biased Commissioners. *Gibson v. Berryhill, supra; Ward v. Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S. Ct. 80 (1972).

The Ninth Circuit's Opinion and the District Court's Decision fail to address the following issue appealed by Sussel. Opening Brief (p. 27). Sussel was deprived of due process because the Civil Service Commission was not impartial in hearing his case in 1985. The Hawaii Supreme Court on December 19, 1989 held that 2 of the 5 Commissioners were enjoined from further participation in Sussel's civil service appeal because of actual bias and an appearance of impropriety, respectively. Addendum A-11 to Appellant's Answering/Reply Brief filed on January 25, 1990. Consequently, dismissal of Sussel's Due Process claim should be reversed as a matter of law.

A fair tribunal did not decide Sussel's case as he was entitled. This is a fundamental deprivation of due process. The two disqualified Commissioners were the tying and deciding votes in 1985 when they voted against Sussel 3 to 2. Without their votes, Sussel's hearing in 1985 would have been 2 to 1 in his favor.

Addendum A-11. Based on these undisputed facts in light of the Hawaii Supreme Court's Opinion, a deprivation of due process occurred in 1985 and summary judgment against Sussel must be reversed on his Second Claim.

The Commission repeatedly violated its own rules in 1985 and 1987 to Sussel's detriment. Fasi wrote to intimidate one Commissioner and did not reappoint her. The attorney representing the Commission also represented the Respondents and has been disqualified. Mayor Fasi refused to proceed forward with the 1985 hearing until he had appointed new Commissioners. These multiple violations of rules can only be attributable to the lack of an impartial fact-finder in this case and to Mayor Fasi's manipulation of a civil service system that enabled him to appoint Commissioners who are partial to him and who are then permitted to rule on a case in which he is the primary defendant. Such a system as applied to Sussel deprived him of due process and an opportunity for a fair hearing, whether it be a pre- or post-deprivation hearing.

The District Court assumed that further Commission proceedings would provide adequate relief for Sussel. Yet, the Commission stated that it did not have the authority to reassign his duties and future proceedings cannot cure the prior constitutional deprivation by the Commission itself.

III. A Two Year And Three Month Hearing Delay And Other Procedural Abnormalities Which Were Caused By Biased Commissioners And The Mayor Violate a Demoted Public Employee's Right to Procedural Due Process

The Court granted summary judgment against Sussel on his substantive due process claim (ER 535-p.25) and dismissed without prejudice his procedural due process claims. ER 535-p.46 to 47. Genuine issues of material fact exist to entitle him to present these claims to a jury.

Procedural due process guarantees a dismissed public employee, who has a property or liberty interest in his job, a pre-termination hearing allowing "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." It must also include oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Section 76-46 Hawaii Revised Statutes (Addendum A-2 to Appellant's Opening Brief) and Rule 10.3.c (Addendum A-5) required that Sussel be given a 10-day prior written notice stating the specific reasons for his demotion. Respondents failed to comply with this civil service and procedural due process requirement. Section 76-30 Hawaii Revised Statutes and Rule 10.3.a provide that he could only be removed or demoted for cause and he was entitled to employment during "good behavior." No cause or prior notice was given to Sussel.

The Ninth Circuit and District Court tried to distinguish *Loudermill* on the grounds that a public employee who is terminated is entitled to prior notice and a prior opportunity to respond, but one who is *demoted* is not. Appendix A hereto (page 8a-9a); Appendix C (page 30a-31a). That distinction affords a public employee who is discharged greater procedural due process rights than one who is demoted even though both employees have the same protected property right under the same state law. This cannot be right especially where the effect of the demotion removed Sussel from the leadership of a vital County Civil Defense Agency. Even Mayor Fasi admitted that the lack of a "clear chain of command" at OCDA jeopardized the public safety.

Loudermill stated that, "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by . . . state law . . . .'" 470 U.S. at 538-39. Sussel, as a civil service employee, possessed property rights in continued employment free from demotion unless cause existed and said 10-day prior notice specifying the cause was given. Civil Service Rules 10.3.a, b, c; 6-302 of City Charter; Addendum A-4; *In re Appeal of Harper*, 52 Hawaii 313, 318, 475 P.2d 53 (1970); *MacKenzie v. Gleason*, 30 Hawaii 477, 484-85 (1928). The District Court acknowledged Sussel's property right when it stated,

> "In this case, we have claims of negligent or intentional violations . . . of plaintiff's procedural due process rights relating to *his property interest (freedom from demotion except for cause).* . . . (emphasis added) Appendix C (p.42a)

The Ninth Circuit's Opinion inexplicably states (Appendix A, p. 8a) that there is a dispute "whether Sussel was demoted or merely downwardly reallocated" and that the latter process is not protected by due process. However, the Ninth Circuit affirmed the District Court on all Cross-Appeal issues including the demotion one. Yet it completely overlooks the District Court's express rejection of the downward reallocation defense and its legal conclusion that Sussel had been *demoted*. Appendix C at pages (fn. 4) 17a-18a,26a; Addendum A-2 to 12/21/90 Appellant's Petition For Rehearing. The District Court Judge expressly stated that Sussel was demoted when he verbally rendered his March 3, 1989 Decision,

> ". . . The Court did a rather exhaustive study of the history and background of the matter, the Revised Charter of the City and County of Honolulu, determinations of the City Corporation Counsel. The Court has reviewed the decision of Judge Honda, and I won't go through in great detail here this Court's reasoning, because it is set forth in the written order which you receive later this morning. . . .
>
> And, by the way, in the body of the Court's order you will see that there has been some allegation or question raised by the defendants as to whether this defendant was, in fact, de-

moted. *The Court finds as a matter of law that the actions* taken by the defendants in this case *amounted to a demotion, whether it be called something other than that*, but, *in fact, it was a demotion*." Addendum A-2 (p.8-10) attached to Appellant's Petition for Rehearing filed on December 21, 1990. (emphasis added).

The District Court Judge in his March 3, 1989 written Decision stated,

> "*Plaintiff was 'demoted'* from Executive Assistant I to Administrative Assistant II on January 11, 1985. During this time, Plaintiff was stripped of all authority and responsibility although his base salary was protected. Plaintiff contends however, that he has not received approximately $17,000 in pay increases which he would have otherwise received due to the change in his salary classification." ER 535-4 to 5. (emphasis added)

The Court further stated in its written Decision,

> "Accordingly, *it is clear*, and *the court so finds*, that the position of Administrator of OCDA was a civil service position at all times relevant to the subject matter of this case. Therefore, plaintiff was entitled to a 10-day written notice of *his demotion* (Revised Rules of the Civil Service Commission, Rule 10.3-c) and an opportunity to challenge *the demotion* decision (Rule 10.5). Further, he was entitled to be *demoted* only for cause (Rule 10.3-a)...." ER 535-17 to 18. (emphasis added)

Judge Ezra elaborated on his demotion finding in footnote 4 of his Decision and did not accept Respondent's reallocation defense.

> "*The City contends that plaintiff was not 'demoted'*. He was 'reclassified' from Executive Assistant I to Administrative Assistant II, retaining the same salary level and remaining in the same department: OCDA. *Therefore, it reasons, it was a 'downward reallocation', not a demotion.* That being the case, under this reasoning, plaintiff was entitled to no notice or hearing under the civil service rules.
>
> It is not disputed that plaintiff was stripped of his duties and benefits as Administrator of OCDA and re-classified to a salary position which deleted some of the salary increases to which he would otherwise have been entitled. This was accomplished by "red-circling" his salary: i.e., leaving plaintiff at a salary level higher than that usually accorded an Adminis-

> trative Assistant II. Plaintiff lost his title, his authority and his office. On these undisputed facts, this court finds that plaintiff was in fact "demoted." ER 535-4 and 5 (fn.4).

The Respondents cross-appealed this issue but it was not reversed. Thus, Sussel was demoted. That is no longer an issue and demotion is an interest protected by the due process clause under State law. Rule 10.3.c of the Civil Service Commission, Addendum A-5 to Appellant's Opening Brief. The Court's misstatement that this is still an issue should be corrected.

Loudermill did not limit its holding to terminated public employees. The due process right to prior written notice of discharges applies to tenured public employees who are demoted when the County law gives them the same rights as discharged employees. The failure to give it is a "distinct due process violation" and "not an alternative theory supporting the same relief." 470 U.S. at 547, n.12. This failure to give a 10-day prior notice before demoting Sussel is a procedural due process violation that has already occurred. That violation forms one of the bases for Sussel's procedural due process claims. Even if under a balancing test Sussel were not entitled to a pre-termination hearing, he is still entitled to the prior written notice. *Loudermill* does not permit a District Court to diminish the minimum procedural due process requirements established under county law.

The deprivation of Sussel's liberty and property interests without due process cannot be cured by the quality of post deprivation procedures. *Fetner v. City of Roanoke*, 813 F.2d 1183, 1186 (11th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1424 (9th Cir. 1985). Since he was already deprived of due process by not receiving prior written notice, he did not have an adequate opportunity to present reasons why the proposed action should not be taken. Procedural due process entitles a party to an unbiased tribunal and notice of the proposed action and grounds asserted for it together with an opportunity to present reasons why the action should not be taken. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Sussel alleged another distinct procedural due process violation which consists of the Commission's unreasonably prolonged delay in hearing his appeal. The delay was from 1/25/85 to 1/7/86. It took the Commission that long to decide, contrary to its rule requiring a decision within 60 days. Addendum A-6. The District Court and the Ninth Circuit did not address this first delay. ER 535-44. The delay was lengthened by the Commission when the case was remanded on May 22, 1987 but it did not hold any hearings for 1 year and 5 months thereafter. This total delay consists of 2 years and 3 months (excluding the 1 year and 4 months of appeal time to Judge Honda from 1/86 to 5/87 and the 60 days provided in the Commission's Rules). The District Court and Ninth Circuit found that the post-January 7, 1986 delays were the "result of legitimate appeals by the parties." Appendix A (p.9a), Appendix C (p.43a). This finding is inconsistent with the facts, overlooks the one year delay caused by the Mayor and/or his biased

Commissioners before any appeal was taken, and raises a genuine issue of material fact for trial.

Sussel pressed the Commission for a prompt hearing in 1985 and again in June 1987 before he fully knew of the Commission's bias. The Commission's attorney in 1987 said they would schedule his hearing pursuant to their rules but failed to explain their failure to do so. Construing the facts in the light most favorable to Sussel, this lengthy delay which was prolonged by the biased Commission and its biased Corporation Counsel rises to the level of constitutional proportions. No appeals even occurred from the Commission during this second delay period. The appeal occurred between January 1986 and May 22, 1987. That time period has been excluded from the remaining collective 2 years and 5 months that the case sat before the Commission with no hearings being conducted. The entire process of Sussel's hearing is tainted by bias, conflicts of interest, and repeated foot-dragging.

In *Loudermill*, the administrative hearings were completed and a decision rendered in 9 months. The delay that Sussel has confronted is a year and 6 months longer than that. *Loudermill* involved no questions of bias, conflicts of interest, and bad faith failure to follow the agency's own rules. Sussel has presented genuine issues of fact showing the delays were intentionally caused by the biased Respondents.

A due process deprivation of a property and a liberty interest exists when viewing the facts in the light most favorable to Sussel since: (1) state law afforded him a 10-day prior written notice of his demotion and it was not provided, (2) he sought to have a full-blown evidentiary hearing on the question of his removal but the hearing was held before a Commission that was biased and would not fully address his claim of political discrimination, (3) two pivotal Commissioners on a 3 to 2 vote were not impartial and have been disqualified, (4) the Commission and the Respondents delayed the Commission proceedings 2 years and 3 months beyond the required 60 days, (5) the Respondents and the Commission were represented by the same lawyers (who have since been disqualified), (6) numerous rules of practice of the Commission were not followed, and (7) just cause was required for a demotion but the demoting authority admitted that its actions were taken for "non-disciplinary reasons." Summary judgment on the procedural due process claims was erroneous.

IV. A Public Employee Who Is Stigmatized In His Demotion Is Deprived of a Liberty Interest Under the First Amendment Where His Post-Deprivation Hearing Is a Sham Orchestrated by Biased Commissioners Appointed by The Party Being Sued

Liberty, in public employment, includes First Amendment rights of political expression, association, and penumbra rights of privacy and reputation. It is a deprivation of the liberty interest in political expression to dismiss a public

employee without due process for expressing political opinions. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983). It is a deprivation of liberty to accomplish a discharge in a manner that injures the public employees' reputation. *Doe v. United States Department of Justice*, 753 F.2d 1092, 1102-03 (D.C. Cir. 1985). Liberty, in the public context, includes First Amendment rights of reputation. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (reputation is a liberty interest.) A communication by an employee involving matters of public concern is a protected liberty interest for which he cannot be discharged without due process. *Rankin v. McPherson*, 483 U.S. 378, 97 L.Ed.2d 315, 107 S.Ct. 2891 (1987); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986); *Berdin v. Duggan*, 701 F.2d 909 (11th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983).

Sussel's January 2nd letter notified the newly-elected mayor of jeopardy to the public safety in civil defense caused by the State Civil Defense Department's intransigence and lack of cooperation with OCDA. Fasi and Anderson never met with Sussel to be briefed on this but attempted to use it to justify his removal (which had already started at noon on January 2nd) on January 7th by stigmatizing his professional reputation by implicitly blaming the poor City/State relations on Sussel and indicating to the press that the solution to the problem was his removal. Fasi's use of the January 2nd letter deprived Sussel of a liberty interest and freedom of speech where he was stigmatized for communicating a matter of public concern to the mayor. Fasi and/or Anderson released the January 7th Memo to the press.

The Administrators of two other County Civil Defense Agencies in Hawaii experienced the same civil defense problems with the State Civil Defense in 1985 as Sussel did. The common denominator for the poor relations was certain personnel at the State Civil Defense, which Fasi did not even bother to ascertain when he failed to be briefed by Sussel. Civil defense matters are a matter of vital public concern. Sussel had a protected free speech obligation to communicate this to Mayor Fasi. Fasi violated Sussel's free speech rights by then stigmatizing him in the effort to remove him when he knew there was no just cause in light of Sussel's excellent performance as Administrator as he was evaluated a month earlier.

An employee who has been stigmatized in or as a result of the process of discharging him, where the stigmatizing charges were made public, and who was denied a meaningful hearing to clear his name, alleges a sufficient liberty interest to implicate the Fourteenth Amendment. Although Respondents contend that Sussel was removed for "non-disciplinary" reasons, Fasi and Anderson attempted to justify his removal (and to cover-up Fasi's real motive of appointing his political appointee) by making additional stigmatizing statements damaging to his reputation in connection with his removal. Those statements, which were made after Kekuna's appointment, include Fasi's statement 9 months later in October 1985

on public radio that Sussel "botched Hurricane Iwa" (which had occurred three years earlier) and that Sussel had stated that the Director of the State Civil Defense was "incompetent." These statements were denied as not being true or not having been made by Sussel. Kekuna prepared a derogatory and defamatory "confidential memo" on January 31, 1985 that was distributed to the press by Fasi in February 1985 and that alleged Sussel isolated himself from his staff members, failed to adequately upgrade emergency preparedness plans, failed to communicate with staff members on crucial matters, and gave preferential treatment to certain staff. Sussel denied these allegations. But Sussel was deprived of a name-clearing hearing to clear these charges in 1985 since one biased Commissioner refused to consider political issues and Sussel was not afforded a fair hearing with impartial Commissioners.

Where the purported reasons given for a discharge are false and have harmed the reputation and standing of a party in the community, a deprivation of Sussel's constitutional rights exists so as to entitle him to damages even though he was only demoted and not discharged. *Siegert v. Gilley*, 59 U.S. Law Week 4465 (May 23, 1991); *Wells v. Doland*, 711 F.2d 670 (5th Cir. 1983); *Eames v. City of Logan*, 762 F.2d 83, 86 (10th Cir. 1985). The employee need not prove falsity of the information, but only needs to allege falsity, as Sussel has done. *Brandt v. Bd. of Coop. Ed. Serv.*, 820 F.2d 41, 43-44 (2d Cir. 1987) (error in granting summary judgment for employer). There are substantial genuine issues of material fact which entitle Sussel to present these First and Fourteenth Amendment claims to a jury.

V. A Civil Servant Is Denied Substantive Due Process When He Is Demoted For No Lawful Reason

The substantive due process entitlement requires that the government not take action that is wholly unrelated to legitimate public interests. Sussel was demoted for reasons of political discrimination since he was not a supporter of Mayor Fasi whereas Kekuna was. Construing the facts in the light most favorable to Sussel, the City's demotion was wholly unrelated to any legitimate public interest and violates the Hawaii Constitution and 6-312.1 of the City Charter. Addendum A-4, 7. Substantive due process scrutiny of a government action involves a case-by-case balancing of the nature of the individual interest infringed and the importance of the government interest furthered. *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980).

In *Major v. Hampton*, 413 F.Supp. 66 (E.D. La. 1976), a substantive due process analysis was applied to the discharge of an IRS official. There was no evidence that plaintiff's actions were calculated to arouse, or aroused, odium for the employee or the IRS and the court determined that there was no rational basis for the government's conclusion for discharge. In *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), the court was also unable to find a sufficient rational connection

between plaintiff's off-duty conduct and the "efficiency of the service" to justify his dismissal. In *Schaper v. City of Huntsville*, 813 F.2d 709, 715 (5th Cir. 1987), the court stated that a substantive due process analysis was recognized as appropriate for an arbitrary deprivation of a property interest in a job. *Accord, Eckmann v. Board of Education of Hawthorn*, 636 F.Supp. 1214, 1218 (N.D. Ill. 1986). In *Johnson v. Jefferson County Board of Health*, 662 P.2d 463 (Colo. 1983), the court vacated the lower court's judgment where it failed to weigh a discharged public officer's free speech rights against the County's interest in discipline and efficiency.

Sussel has been deprived of his substantive due process rights since there is no rational reason for his demotion. Construing the facts in the light most favorable to him, he was removed without just cause, which is contrary to the civil service laws. Fukuda said he was demoted for nondisciplinary reasons. Political discrimination is not a rational basis for his demotion, since it violates the law. 76-44 H.R.S.; 6-312.1 and 6-302 of City Charter; Addendum A-2, 4. In light of his excellent performance record, there was no legitimate reason to remove him. This substantive due process claim should be presented to the jury and it also prevents dismissal of his 1983 claim.

VI. Dismissal of Constitutional Claims and 42 U.S.C. 1983 Claims Under Parratt Was Erroneous

Dismissal of procedural due process claims under Parratt (ER 535-46) was erroneous since he still has First Amendment claims and was deprived of a liberty interest and substantive due process. Sussel presented substantial evidence showing that the Respondents' actions were intentional and not "random." Construing the facts in the light most favorable to him, the Court must conclude that the Respondents' conduct was deliberate, since the District Court found that fact issues exist regarding the parties' intent and the reasonableness of their conduct on the issues of qualified immunity and punitive damages. ER 535-28, 23.

Parratt "does not apply to intentional deprivations of liberty that rise to the level of substantive due process violations." *McRorie v. Shimoda*, 795 F.2d 780, 785 (9th Cir. 1986). Sussel was deprived of a liberty interest and substantive due process.

Punton v. City of Seattle, 805 F.2d 1378 (9th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987), which was relied on by the District Court is distinguishable since its Commission was impartial and did not delay proceedings, whereas, Sussel did not complete his proceedings because he was deprived of due process in the course of pursuing his rights and was compelled to file a federal court action.

The *Parratt—Hudson Doctrine* only applies in cases involving "a random and unauthorized act by a state employee.... not a result of some established state procedure." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

Where the challenge is to "an established state procedure", the availability of a post-deprivation judicial hearing normally does not satisfy procedural due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Conduct is not random and unauthorized when it is pursuant to a de facto governmental policy. *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986). There was a de facto governmental policy established by the mayor to remove Sussel and substitute Kekuna. Conduct is not random and unauthorized when the deprivation of rights is foreseeable from the position of one who possesses delegated authority to grant a hearing. *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985); *Grecko v. Guss*, 775 F.2d 161 (7th Cir. 1985). Conduct is not random and unauthorized when a contested decision is pursuant to a deliberate decision of an official with power to set policy. *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985); *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985). Conduct is not random and authorized when it is pursuant to a deliberate though unauthorized practice or policy. *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985); *Hicks v. Feeney*, 770 F.2d 375 (3rd Cir. 1985). A deliberate policy decision was made by Fasi to remove Sussel. The deprivation was foreseeable since he established his policy at least two weeks before he was sworn in as mayor. The policy, though unauthorized under the civil service laws, was deliberately set and under *Piatt* that is sufficient to establish conduct that is not random and unauthorized. "By definition, a conspiracy . . . cannot be a random act, even if it was accomplished without the endorsement of the state governmental apparatus." *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985). Fasi's actions and the other three City officials who implemented his policy come within the conduct that is not random and unauthorized since even the Court concluded that sufficient facts exist to maintain 1983 claims against the Respondents in their individual capacity. ER 535-22.

Parratt is inapplicable to a deprivation of a liberty interest. *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 n.4 (10th Cir. 1985). *Parratt* does not apply to violations of substantive constitutional rights, but is limited to violations of procedural due process. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985); *O'Quinn v. Manuel*, 773 F.2d 605 (5th Cir. 1985). With respect to substantive constitutional rights, "the constitutional violation is complete at the moment when the harm occurs." *Gilmere*, 774 F.2d at 1500. Applying *Parratt* to alleged violations of substantive constitutional rights would "write *Monroe* out of existence, a result clearly not intended by *Parratt*." *Augustine v. Doe*, 740 F.2d 322, 326 (5th Cir. 1984).

> "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. . . . *Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safe-

guards is impracticable or infeasible." 740 F.2d at 329.

Although the Court found that genuine issues of fact existed on the issue of qualified immunity (ER 535-23), the Court dismissed the 1983 and conspiracy claims against the individual Respondents (Appendix D at pages 53a,54a; ER 573-4, 5) and against the City (ER 535-21). The Court had initially found that, "... Plaintiff has asserted facts sufficient to maintain his 42 U.S.C. 1983 claim against those defendants sued in their *individual* capacities." ER 535-22. It denied summary judgment on that issue against the individual Respondents, but then reconsidered and dismissed those claims against the individual Respondents under *Parratt*. Reversal of the *Parratt*-based dismissal against the City should result in reversal against the individual Respondents. The Court dismissed the 1983 claim by stating that Sussel failed to prove a City policy for his removal. ER 535-20. It stated:

> "... No credible evidence has been submitted ... to suggest that the City, through its City Council or otherwise, has either adopted or tacitly approved the acts of its officers which may have contravened City rules, or state and federal law." ER 535-21

However, approval by the City Council was not required for removal of the Administrator of OCDA under 6-104 of the City Charter. The Mayor alone had the removal power. 6-104, 5-103(a); Addendum A-4.

Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978) stated that, local governing bodies can be sued directly under 1983 where the unconstitutional action implements a policy statement or decision officially adopted or promulgated by those "whose edicts or acts may fairly be said to represent official policy." The "official policy" can be based on long-standing custom but does not have to be. Official policy may also be based on a single decision of policy makers. *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1298 (1986); *Reed v. Schneider*, 612 F.Supp. 216, 222 (E.D.N.Y. 1985).

In *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983), the court reversed the dismissal of plaintiff's civil rights action against a municipal corporation and held that she had presented sufficient evidence that her single unlawful discharge resulted from an "official policy" of the municipal corporation since:

> "A single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' ... may support an action against the municipal corporation. .... *Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy.... An official has final authority*

> *if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions. . . .*" (emphasis added) 710 F.2d at 45.

A single act of a mayor may constitute official municipal policy which will render both the mayor, individually, and the City liable to the injured plaintiff. In *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), it was held that a mayor had violated the constitutional rights of the plaintiffs by having them arrested when they refused to refrain from meeting as the City's Land Clearance and Housing Authority when the Mayor sought to replace them. In *Burkhart v. Randles*, 764 F.2d 1196, 1198 (6th Cir. 1985), the court reversed a directed verdict in favor of a County since the evidence established that the defendant represented the County as the highest ranking official in the Office of the Clerk and was solely responsible for executing the policies and operation of the office. Her actions of firing two employees-at-will were not subject to approval by any other persons in the County. In *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984), the denial of a city defendant's motion for directed verdict on the plaintiff's First Amendment substantive claim was proper where a police officer had been fired without procedural due process and in violation of his First Amendment right of association. The court concluded that the Chief of Police had the final or ultimate authority within the local government to make the decision to fire despite the existence of an appellate process.

In *Hammond v. County of Madera*, 859 F.2d 797, 803 (9th Cir. 1988), the Court reversed a dismissal of a civil rights claim and held that a county was liable under 1983 where the county board of supervisors was authorized to make policy in the area of rights of way and road acquisitions. The court stated in that for an official's act to constitute municipal policy, it must be demonstrated that the policy-making authority for a particular city function was delegated to that official and that whether an official has the responsibility for making law or setting policy is a question of state law. In *Rebel Van Lines v. City of Compton*, 663 F.Supp. 786, 789 (C.D. Cal. 1987), the court denied a city's motion for summary judgment on a 1983 claim where a single decision was made by a city not to sell real property to plaintiff. Accord, *Bartholomew v. Fischl*, 782 F.2d 1148, 1153 (3rd Cir. 1986). In *Williams v. City of Valdosta*, 689 F.2d 964, 969 (11th Cir. 1982), the court reversed a grant of a city's motion for judgment notwithstanding a verdict in a case where a fire fighter sued under 1983 alleging that the city had abolished his job and demoted him because of his first amendment activities. The court stated:

> "... Here, City Manager Horton is vested with final responsibility under the city's personnel ordinance for the demotion of City employees. Thus, his act of demoting Williams may fully be said to represent official city policy.... we hold that the city is properly the subject of a 1983 suit by Williams for his demo-

tion." 689 F.2d at 969.

> "... But, the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that *it expressly envisioned other officials' whose acts or edicts may fairly be said to represent official policy,...*" (emphasis added). *Pembaur*, 106 S.Ct. at 1298;

Thus, the City Council's approval is not essential to formulating City policy. For liability to attach a decision maker "must possess *final authority* to establish municipal policy with respect to that action ordered." *Id.*, at 1299. Fasi, as the decision maker in removing Sussel, made the policy to substitute Kekuna and had the final authority to remove under 6-104.

CONCLUSION

The Court should grant Certiorari and the summary judgment below should be reversed on Petitioner's First Amendment, Fourteenth Amendment, and 42 U.S.C. 1983 claims.

Respondents failed to show any legitimate reason for Sussel's January 2, 1985 demotion, especially where Fasi's new Civil Service Director stated that the demotion was for *non-disciplinary* reasons and his performance evaluation on November 30, 1984 was excellent. Construing the facts in the light most favorable to Sussel, he was demoted because he had not supported Fasi and he was in the way of Fasi's acknowledged *commitment* to his Republican supporter Kekuna who was rewarded with Sussel's job. The applicable causation test in *Rutan*-type cases should be settled. Applying the *Mt. Healthy* test shows that the political affiliation and support of Sussel's replacement and Sussel's non-affiliation were the substantial factors in Sussel's demotion in this First Amendment political discrimination case. Summary Judgment should be reversed (1) on Petitioner's First Amendment (and related 42 U.S.C. Section 1983) claims where genuine fact issues show his demotion was based on political affiliation and support reasons to make room for a Republican political patronage appointee who had supported Republican Fasi, and (2) on his Due Process claims where an impartial tribunal was denied him.

DATED: Honolulu, Hawaii; June 5, 1991.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER

December 6, 1990

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

No. 89-15777
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15778
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15779
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15780
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. at.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The memorandum disposition filed August 7, 1990, is withdrawn. The attached disposition is filed in its stead.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

MEMORANDUM[1]

December 6, 1990

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y'; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15780
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted April 9, 1990 Honolulu, Hawaii

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

Our independent review of the record supports the district court's conclusion that Sussel was in a civil service position. The state court decision resolves this issue. The central issue is therefore whether Sussel has alleged sufficient facts to support a claim for violation of due process: "It is not every erroneous administration of state law that results in a denial of due process." *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To determine whether a genuine issue of fact is presented on the question of due process we first determine if there was a property interest and if so, what process was due before the government could deprive Sussel of that property interest. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

As a civil servant, Sussel has a property interest in his job that is protectable and subject to due process. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The City civil service rules provide that when a covered employee is dismissed or demoted, there shall be written notice to the employee at least ten days prior to the effective date of the action, setting forth the reasons for the action taken. Revised Rules of the Civil Service Commission 1.1-D (Rule 10.2.c).

Sussel, however, was not terminated. He continues employment with the city and collects the same salary as he did before the acts complained of. The dispute is not whether demotion is an interest protected by the due process clause but whether Sussel was demoted or merely downwardly reallocated. The latter process is not protected by due process. State law determines the property interest in question but federal law determines whether or not the taking of such interest is a violation of due process. See Logan, 455 U.S. at 432.

Sussel has failed to establish a genuine issue of material fact as to whether he was denied property without due process. The "root requirement" of due process is "that an individual be given an opportunity for a hearing before he is deprived of any significant

property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (first emphasis added, second emphasis in original), *quoted in, Loudermill*, 470 U.S. at 542. The hearing need not be a formal one. *See Loudermill*, 470 U.S. at 543 n.8. When Sussel's responsibilities were decreased, he had notice and a "hearing" before the Mayor, the person making the decision. He received notice and an opportunity for hearing before any change in pay occurred. Sussel also has an established post-deprivation procedure, with which he is familiar; that Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process. *Cf. Loudermill*, 470 U.S. at 547. The delay in this case is the result of legitimate appeals by the parties.

Whether Sussel was victim of poor treatment is not the question. He was not terminated and he retains his salary. *Cf. Loudermill*, 470 U.S. at 544-45.

Sussel also fails to establish a genuine issue of material fact on the first amendment claim. He has not alleged facts that support a claim that the exercise of his first amendment rights was a substantial or motivating factor for the actions taken towards him. *See Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). Sussel relies upon his letter to Fasi describing the problems present between the state and the city civil service defense organizations to support his argument. This letter was written several weeks after Fasi announced his intention to place Kekuna in a management position at the Oahu Civil Defense Agency. Further, Sussel has failed to present sufficient probative evidence that he was demoted solely on the basis of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990).

Sussel fails to raise a genuine issue of material fact on his equal protection claim. He alleges no facts to demonstrate that he was part of a group that is treated unequally. He complains of treatment to him as an individual. *See generally Plyer v. Doe*, 457 U.S. 202, 217 n.14 (1982) (fourteenth amendment designed to abolish "class or caste" treatment). He also fails to allege sufficiently egregious treatment to reach the level of a substantive due process violation. *See e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987) (substantive due process prohibits conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty).

Summary judgment was appropriate on all of Sussel's federal claims. It was therefore within the district court's discretion to

remand all state issues. *See* 28 U.S.C. § 1441(c); *Carnegie- Mellon University v. Cohill*, 484 U.S. 343 (1988). Because these claims could have been pled in the alternative, *see* Fed. R. Civ. P. 8(e)(2), we vacate the summary judgment as to them and remand so that the district court may have an opportunity to consider whether the state contract claims should be dismissed without prejudice to Sussel's pursuing them in a state forum.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

NOT FOR PUBLICATION

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER

February 7, 1991

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y' ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The memorandum disposition filed December 6, 1990, is amended as follows. At page 5, delete the last two sentences of the second full paragraph and insert,

Further, Sussel has failed to present sufficient probative evidence that he was demoted because of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2735 (1990).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL,

CIVIL NOS. 86-1136
88-00375

Plaintiff,
vs.
CITY AND COUNTY OF HONOLULU,et al.

Defendants.
March 3, 1989

DECISION ON PLAINTIFF'S AND DEFENDANTS' VARIOUS MOTIONS FOR SUMMARY JUDGMENT, TO DISMISS, TO STAY PROCEEDINGS, AND FOR OTHER RELIEF

BACKGROUND [1]

Malcolm A. Sussel ("plaintiff") brings these cases alleging various violations of the United States and State of Hawaii Constitutions and Hawaii State Statutes and further asserts certain common law claims for his alleged demotion from his position with the City & County of Honolulu as Administrator of the Oahu Civil Defense Agency ("OCDA"). Named as defendants are the City & County of Honolulu ("City"), Mayor Frank Fasi ("Fasi"), former Managing Director D.G. "Andy" Anderson ("Anderson"), Administrative Assistant to the Managing Director George Kekuna ("Kekuna"), Director of the Department of Civil Service Loretta Fukuda ("Fukuda"), and The Civil Service Commission and its individual members in their official capacities ("Commission"). Fasi, Anderson, Kekuna

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1 Although the factual background of these cases are, for the most part, undisputed, it will be noted where the parties' versions differ in some relevant aspects. However, for the purposes of each motion, this court must construe the facts in the light most favorable to the non-moving party on that motion. T.W. Electrical Services, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

and Fukuda are named in both individual and official capacities. Defendant Jeremy Harris ("Harris") is also named in his official capacity as the current Managing Director of the City & County of Honolulu.

Plaintiff was appointed to the position of Administrator of OCDA[2] on June 2, 1982 by Eileen Anderson, who had defeated the incumbent, defendant Fasi, for re-election as Mayor of the City & County of Honolulu. Plaintiff was selected after making application and being reviewed pursuant to the relevant civil service procedures in place at that time. At the time of his application, he was serving as assistant Administrator of OCDA, a position which all parties to these cases agree is a civil service position.

Among other things, plaintiff alleges he relied on past policies and upon the representations of the Eileen Anderson administration in forming the belief that his position as OCDA Administrator was "permanent" unless good cause was shown for his removal: i.e., that the position was subject to civil service status and protection. In addition, in December 1984, the Corporation Counsel, legal advisor to the City, restated an earlier opinion that the Administrator's position was in fact subject to civil service commission rules.

In the ensuing mayoral election, Fasi changed political parties (from Democrat to Republican) and defeated Mayor Anderson, assuming office January 2, 1985. In December 1984, before taking office, Fasi determined to hire a replacement for plaintiff to run OCDA. Plaintiff claims Fasi specifically decided to hire Kekuna for this role in the new administration. Fasi submits Kekuna's name was supplied by a committee set up for that purpose.

Kekuna's title would become "Deputy Director Designate"[3]

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2 The City contends that plaintiff is not the "Administrator" of OCDA because, officially, there exists no such position. This court finds, contrary to defendant's argument, that plaintiff was "Administrator" of OCDA in reality if not in title. Although plaintiff was classified "Executive Assistant I" and not "Administrator", the position he held was initially advertised as "Administrator" and has been so known all along. This distinction, however, is one without a difference. Neither plaintiff's rights nor the defendants' responsibilities depend upon the "title" plaintiff held but rather, they depend upon the position he occupied.

3 Under the applicable statutes and rules, the state appoints a Director of the Civil Defense agency for the entire State of Hawaii. Upon the recommendation of that state director, each county then appoints a Deputy Director for that county. Traditionally, the Deputy Director for the Island of Oahu is the Mayor of the City & County of Honolulu.

and that position would officially be a part of the City's Managing Director's office. According to plaintiff, on December 15, 1984, Fasi told plaintiff that plaintiff's position was not subject to civil service commission rules and that Kekuna would be assuming plaintiff's duties at OCDA.

On January 2, 1985, plaintiff also alleges defendant Anderson admitted that the OCDA position was subject to civil service commission rules but that defendant Fasi was going to allow Kekuna to run OCDA to fulfill a political promise. (Plaintiff claims Kekuna assisted Fasi in Fasi's campaign.) On this same date, Fasi, Anderson, Kekuna and defendant Fukuda were sworn into office.

On January 7, 1985, Fasi, through Anderson, named Kekuna to assist in the management of OCDA. Anderson circulated a memo among the employees of the OCDA instructing them to look to Kekuna "for direction and guidance." Kekuna told plaintiff that he, Kekuna, would be in authority at OCDA and required plaintiff to remove his personal belongings from the office plaintiff had up to then occupied. On January 11, 1985, Anderson appointed an assistant for Kekuna and, by letter, told plaintiff to work only regular hours, not to respond to emergencies, and to turn in his pager and his keys "to the executive toilet". Plaintiff was again required to change offices.

On January 9, 1985, according to plaintiff, Fukuda (appointed Director of Department of Civil Service) told plaintiff that because plaintiff's position was not civil service, Fasi and Anderson could do anything they wanted to do with regard to plaintiff's position.

Plaintiff was "demoted"[4] from Executive Assistant I to Administrative Assistant II on January 11, 1985. During this time, plaintiff was stripped of all authority and responsibility although his base salary was protected. Plaintiff contends, however, that he has not received approximately $17,000 in pay increases which he would have otherwise received due to the change in his salary classification.

On January 25, 1985, plaintiff filed a timely appeal of this action to the Civil Service Commission asserting that he was a civil service employee filling a civil service position. Therefore, he contended he was entitled to written notice prior to his demotion and a showing of

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4 The City contends that plaintiff was not "demoted". He was "reclassified" from Executive Assistant I to Administrative Assistant II, retaining the same salary level and remaining in the same department: OCDA. Therefore, it reasons, it was a "downward reallocation", not a demotion. That being the case, under this reasoning, plaintiff was entitled to no notice or hearing under the civil service rules.

"cause" for that demotion. On January 7, 1986, a decision of the Commission was rendered that the position of Administrator of OCDA was not subject to civil service requirements. Plaintiff appealed that decision to the First Circuit Court of the State of Hawaii.[5] On May 22, 1987, the Honorable Edwin H. Honda, Circuit Court Judge of the First Circuit, reversed the Commission and ruled the plaintiff's position was in fact a civil service position and remanded the matter to the Commission for proceedings in accordance with the court's ruling.

After plaintiff's appeal of the commission's decision but before the state court's ruling was received, plaintiff filed suit in this court (Civil No. 86-1136) seeking damages under 42 U.S.C. § 1983 and pendent state claims for defendants' alleged deprivations of plaintiff's due process rights.

After the matter was remanded to the Commission, plaintiff petitioned several of the commission members to disqualify themselves from further involvement in plaintiff's case. Upon their refusal to do so, plaintiff petitioned the state circuit court for their removal. The court (Honorable Marie N. Milks presiding) found only one member of the Commission biased. Plaintiff appealed the circuit court's failure to remove one other member of the Commission to the Hawaii State Supreme Court. On plaintiff's motion, the State Supreme Court has stayed further commission action pending its resolution of that appeal.

On December 16, 1987, after the remand to the Commission but before plaintiff's challenge to the commission members' qualifications, the Honorable James Ideman, Visiting United State District Court Judge, entered an order staying this action pending the final resolution of the commission proceedings and resultant state court review.

It is not disputed that plaintiff was stripped of his duties and benefits as Administrator of OCDA and re-classified to a salary position which deleted some of the salary increases to which he would otherwise have been entitled. This was accomplished by "red-circling" his salary: i.e., leaving plaintiff at a salary level higher than that usually accorded an Administrative Assistant II. Plaintiff lost his title, his authority and his office. On these undisputed facts, this court finds that plaintiff was in fact "demoted".

5 *Malcolm A. Sussel v. Civil Service Commission of the City and County of Honolulu, et al.*, Civil No. 86-0328 (1986).

On April 29, 1988, plaintiff filed a second complaint in state circuit court which is virtually identical to the complaint originally filed here (Civil No. 86-1136): the only difference being the addition of two claims. That state case (now Civil No. 88-00375) was removed to this court by defendants. After plaintiff's challenge of the Commission for bias but prior to the removal of the state case, Judge Ideman vacated his stay in Civil No. 86-1136.

On December 22, 1988, a claim was filed by the City as plaintiff's employer with the state Workers Compensation Department for damages resulting from "administrative actions which allegedly occurred at his place of employment."

PLAINTIFF'S CLAIMS FOR RELIEF

Based on the above facts, plaintiff's consolidated complaints allege the following causes of action against all defendants:

(1) violation of the Revised Charter of the City & County of Honolulu, Section 6-104, Hawaii Rev. Stat. §§ 128-13(1) and 128-13(d), Article XVI, Section I and Article I, Section 5 of the Hawaii State Constitution and the due process and equal protection rights guaranteed by the fourteenth amendment to the Untied States Constitution;

(2) 42 U.S.C. § 1983;

(3) pendent state claims (those listed in Claim 1) to § 1983;

(4) conspiracy to violate civil rights;

(5) negligent and/or intentional infliction of serious mental and emotional distress;

(6) breach of contract;

(7) tortious breach of covenant of good faith and fair dealing;

(8) political discrimination in violation of Section 6-312 of the Revised Charter of the City & County of Honolulu;

(9) intentional and/or negligent misrepresentation;

(10) equitable estoppel, implied contract, unjust, abusive and wrongful dismissal or removal;

(11) intentional interference with contract relations;

(12) defamation;

(13) conspiracy to commit torts, wrongful conduct, and breach of contract;

(14) negligence;

(15) punitive damages;

(16) disqualification of biased commission; and

(17) violation of Section 6-104 of the Revised Charter of the City and County of Honolulu.[6]

Plaintiff asserts jurisdiction in this court based upon 28 U.S.C. §§ 1343, 2201, 2202, and 1331.

Defendants filed answers to plaintiff's complaints denying the allegations therein. Defendants Fasi, Anderson, Kekuna and Fukuda have also filed cross-claims against the City for contribution and indemnity. However, those cross-claims are not the subject of any of the instant motions.

PENDING MOTIONS

On February 15, 1989, the following motions filed by the various parties came on for hearing before this court:[7]

(1) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claims 1, 2 and 3;

(2) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claim 3;

(3) Defendant City's Motion for Partial Summary Judgment filed August 16, 1988 as to Claims 1, 2, 3, 4, 6, 7, 10, 11, 12, and 15 (filed on behalf of all defendants in all capacities);

(4) Plaintiff's Motion for Partial Summary Judgment filed January 4, 1989 as to Claims 1, 2, 3 and 14;

(5) Defendant Anderson's Motion t Stay Proceedings or To Dismiss filed January 6, 1989;

(6) Defendant City's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to all claims;

(7) Defendant Anderson's Motion for Summary Judgment in his individual capacity filed January 17, 1989 as to all claims;

(8) Defendant Anderson's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to Claim 12;

(9) Defendant Fasi's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to Claim 12;

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6 Although some of the claims in Civil No. 88-00375 are numbered differently from those in Civil No. 86-1136, for ease of understanding, plaintiff's claims will be referred to as numbered in this order. The two additional claims added by Civil No. 88 00375 are numbered 16 and 17 herein.

7 Also heard at this hearing was an appeal of a Magistrate's Order On Several Motions Regarding Representation By Counsel filed February 2, 1989. This court's decision on that appeal is set forth in a separate order dated February 21, 1989.

(10) Defendant Fasi's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims;

(11) Defendant Fukuda's Motion for Summary Judgment or to Dismiss filed January 17, 1989 as to all claims ;

(12) Defendant Fukuda's Motion for Rule 11 sanctions filed January 17, 1989;

(13) Defendant City's Motion to Dismiss Civil Service Commission and all individuals in *official* capacities filed January 25, 1989; and,

(14) Defendant Fukuda's Cross-Motion for Summary Judgment filed January 27, 1989 as to all Claims except Claim 12.

All parties were represented by counsel at the hearing and given the opportunity to argue all motions. All defendants have either authored or joined in all motions on behalf of all other defendants.

LEGAL STANDARD

All motions, except the Motion to Reinstate the Stay and the Motion for Rule 11 Sanctions, are for summary judgment, partial summary judgment or to dismiss part or all of plaintiff's complaints. Because matters outside the pleadings have been considered by the written and oral submissions of counsel, all motions (except those two specifically mentioned above) will be treated as Rule 56 motions for summary judgment or partial summary judgment. Fed. R. Civ. P. 12(c); *Rosales v. United States*, 824 F.2d 799, 802 (9th Cir. 1987).

Fed. R. Civ. P. 56(c) provides for summary judgment when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Electrical Services, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*citing Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

If the moving party meets this burden, then the opposing party may not defeat a motion for summary judgment absent any significant

probative evidence tending to support his claim. *Commodity Futures Trading Comm'n v. Savage*, 611 F. 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the moving party's evidence at trial. *See T.W. Elec., supra.*

When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts must be drawn in the light most favorable to the opposing party and may be drawn both from underlying facts that are not in dispute as well as from disputed facts. T.W. Elec., 809 F.2d at 631.

As stated in *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 108 S.Ct. 698 & 699 (1988):

> In three recent cases, the Supreme, Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First the Court has made clear that if the non-moving party will bear the burden of proof at trial ass to an element essential to its case, and the party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex v. Catrett*, U.S., 106 S.Ct. 2548, 2552 53, 91 L.Ed. 2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*" *Anderson v. Liberty Lobby, Inc.*, U.S. , 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes that non-moving party's claims implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

DISCUSSION

I. CIVIL SERVICE STATUS

Initially, this court must address the seminal issue in this case: Was the position of Administrator of the Oahu Civil Defense Agency a civil service position at the time plaintiff was selected for and occupied that position?

This court's function in determining an issue of state law is to make a reasonable effort to determine how the state courts would rule on that issue.[8]

In 1969, Fasi replaced the then Administrator of the OCDA, Ralph Neal, without notice or "cause". In *Neal v. Fasi*, Civil No. 27338, First Circuit Court, the court held the position of Administrator of OCDA was covered by civil service rules. Neal, however, resigned the position almost immediately after the court's decision and that decision was never appealed. Anderson claims this decision has no force here because: a) it was never appealed; b) Neal resigned immediately after the court decision rendering its conclusion moot; and c) the law changed after 1969.

On October 22, 1981, the Corporation Counsel for the City issued an opinion that the Administrator of the OCDA was subject to civil service commission rules as set forth in *Neal v. Fasi*. As previously indicated, in 1984, the Corporation Counsel again reaffirmed its opinion.

It is uncontroverted that the position for which plaintiff applied was advertised by the City as a civil service position. Plaintiff applied for, was selected and, once selected, was reviewed under civil service guidelines (6 month probationary review before permanent status given and annual reviews).

In viewing this issue, one item of documentary evidence gives additional support to the proposition that the OCDA position was always intended by the City to be a civil service position. Bill No. 171 (1986), Draft 3 was submitted to the City Council of the City & County of Honolulu and entitled: A BILL FOR AN ORDINANCE TO AMEND CHAPTER 2, REVISED ORDINANCES OF HONOLULU 1978, AS AMENDED, TO ADD A NEW ARTICLE RELATING TO THE OAHU CIVIL DEFENSE AGENCY. The effect of that

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8 The court notes that there is no disagreement that plaintiff himself is protected by civil service. In fact, the City concedes this issue. The question relates to the position which plaintiff held.

bill was to specifically include the civil defense Administrator's position within civil service. That bill was approved by the City Council over the mayor's veto on January 14, 1987.

Fasi concedes that this bill would assist plaintiff but only if it had been in existence before he was removed from his position. Therefore, by implication he argues that no inference should be drawn from the bill's passage. (A copy of the bill and a copy of the council's action approving it were attached as exhibits to Fasi's January 17, 1989 Motion To Dismiss or For Partial Summary Judgment.)

However, even a cursory reading of the bill indicates that it is much more than a statement by the City Council that it wanted at the time of the bill's passage to make this position one of civil service. As stated in the bill: "It is the intent of the Council in enacting this ordinance to clarify the meaning of the term 'employee' in Section 6-303(b) RCH, to include the Civil Defense Administrator." (Emphasis added). As will be pointed out below, this was a statement of the Council's intent to indicate that it was always the City's intention that the position be considered civil service.

Until Bill No. 171 was passed, Section 6-303 provided for the exemption of certain executive branch *positions* from the city civil service laws and included:

> (b) Positions in the office of the mayor, but such positions shall be included in the position classification plan. Employees of the office of information and complaint, municipal reference and records center and Royal Hawaiian Band, other than the heads of such agencies, and *employees of the civil defense agency shall not be exempted from civil service.* (Emphasis added).

This section was effective throughout the years plaintiff served OCDA.

Defendants argue that the term "employee" did not include the head of the civil defense agency. However, the language of the bill makes it clear that it was the original purpose of the council to include the Administrator of OCDA as an "employee" as defined by this subsection. As the drafters of the bill declared:

This view is supported by the language of

> Section 6-303(b) itself which includes the heads of the Office of Information and Complaint, the Municipal Reference and Records Center, and the Royal Hawaiian Band in the term "employee" as it refers to those agencies. This view is further supported by the records of the Charter Commission that drafted this provision, indicating that the Commission had knowledge that the Circuit Court of the First Circuit, State of Hawaii, had determined the City's Civil Defense Administrator to be a civil service *position* and indicating its desire to maintain the civil service status of *positions* that had theretofore been civil service *positions*. (Emphasis added).[9]

This bill clearly deals with the position of Administrator and not its occupant. Further, it does not represent a change of attitude by the City Council. Rather, it is a statement of the council's intent from the outset: i.e., the position of Administrator of OCDA is one of civil service. This bill was approved over the veto of the mayor while this case was pending.[10] It is a statement of intent by the City and is therefore admissible in this court as a statement against interest.[11] It

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9 This statement is taken from the comments of the drafters of Bill No. 171 which are included as part of that document.

10 This court notes that the language of the bill as passed recognized the existence of plaintiff's appeal to the civil service commission and this court action. Section 3 of the enacted ordinance states:

> Nothing in this ordinance shall prejudice the rights of any person finally adjudicated by a court of competent jurisdiction to be subject to the civil service laws and to be the civil defense Administrator of the City and County of Honolulu to continue in that office subject to this ordinance.

11 Fed. R. Evid. 804(b)(3) defines this exception to the hearsay rule as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . .

The council's action clearly falls within this exception.

also constitutes a restatement of the Final Report of the Charter Commission of the City and County, 1971 1972. In part, that document reads:

> It is intended that the employees of the agency within the office of the Mayor . . . or agencies attached to the managing director's office for administrative purposes (. . . civil defense agency . . .) be civil service employees, but the heads of these agencies, *excepting the head of the civil defense agency*, are exempt from civil service and the position classification plan. (Emphasis added.)

As noted above, State Circuit Judge Honda found plaintiff's position to be civil service. Although that decision is not final for purposes of appeal and not binding here, it gives this court further affirmative guidance on the likely resolution of this issue in state court. It is noted that Judge Honda's opinion is well reasoned and reaches a conclusion with which this court agrees.

Accordingly, it is clear, and the court so finds, that the position of Administrator of OCDA was a civil service position at all times relevant to the subject matter of this case. Therefore, plaintiff was entitled to a 10-day written notice of his demotion (Revised Rules of the Civil Service Commission, Rule 10.3.c[12]) and an opportunity to challenge the demotion decision (Rule 10.5). Further, he was entitled to be demoted only for cause (Rule 10.3-a). Defendants claim that because plaintiff was: (a) informed of Fasi's decision in December 1984; and (b) was allowed to meet informally with Fasi to discuss the matter, he was given all the due process to which he was entitled. A determination of this issue will not be made by this court for reasons set forth below.

Therefore, plaintiff's Motion for partial Summary Judgment on the issue of his civil service status filed August 15, 1988 is granted.

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12 These rules are part of the Revised Rules of the Civil Service Commission effective as of January 2, 1985.

II. CLAIMS BASED IN CONTRACT

The majority of plaintiff's breach of contract claims are, by his won admission, couched in the alternative: i.e., plaintiff claims he was entitled to retain his position based on either its civil service status or he claims entitlement to the same result based on an implied contract of employment. If such an implied contract did exist, plaintiff argues that its terms would be the same as the terms of his employment as a civil service employee.

Since this court has found that the position of Administrator of OCDA was a civil service position, there can have been no implied contract. That being the case, plaintiff's claims based in contract and those arising because a contract is alleged to have existed must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). They are:

Claim 6 - Breach of Contract

Claim 7[13] - Implied Covenant of Good Faith and Fair Dealing

Claim 9 - Negligent Misrepresentation

Claim 10 - Equitable Estoppel, Implied Contract, unjust Dismissal or Removal

Claim 11 - Intentional Interference with Contractual Relations

Claim 13 - That portion relating to Breach of Contract.

Defendants' motions for summary judgment on these claims are therefore granted.

III. § 1983 - OFFICIAL POLICY

To establish a claim against the City under 42 U.S.C. §1983, plaintiff must show that a policy or custom of the City, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy", was the "moving force" which caused his injuries. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978). *See* also *Wood v. Sunn*, 852 F.2d 1205, 1212 (9th Cir. 1988); *Meehan v. County of Los Angeles*, 856 F.2d 102, 106-07 (9th

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13 Plaintiff contends this cause of action would still exist even if the duty to deal fairly was *expressed* as it is in the civil service regulations. This court rejects this theory as illogical. Further, this cause of action has been specifically rejected in Hawaii. *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370 (1982); *Kinoshita v. Canadian Pacific Airlines, Ltd.*, 68 Hawaii , 724 P.2d 110, 115 (1986).

Cir. 1988). As noted above, plaintiff has charged that his injuries were the result of acts *contrary* to the United States Constitution, the Hawaii State Constitution, Hawaii State Law and the revised Charter of the City. Plaintiff has not, by these claims, alleged an affirmative policy or custom of the City.

Plaintiff submits, however, that this "policy" requirement can be met even if specific acts complained of are not formally approved through official decision-making channels if they are acquiesced in or adopted by the relevant decision making authorities. This is a correct statement. However, for those acts and practices to suffice and become, as a matter of law, the "policy" of the City, they must "be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell*, 436 U.S. at 691 (footnote omitted).

Construing the facts before this court in the light most favorable to the plaintiff, he has failed to carry his burden regarding this element of his case. Plaintiff claims defendant Fasi's attempt to replace Mr. neal in 1969 coupled with his own demotion in 1985 constitute the custom and usage required by *Monell*. The facts do not support this contention in light of relevant City documents referred to elsewhere in this order. No credible evidence has been submitted plaintiff to this court to suggest that the City, through its City Council or otherwise, has either adopted or tacitly approved the acts of its officers which may have contravened City rules, or state and federal law.

Further, conduct which may reflect the *personal policy* of an agent of the City does not automatically translate into official policy of the City itself. The City cannot be held liable under § 1983 merely for employing an alleged tortfeasor. *Monell, supra; Wood, supra; Meehan, supra.*

Therefore, the § 1983 claim (Claim 2) against the City must be dismissed. Fed. R. Civ. P. 12(h)(3).[14] Also dismissed is the related allegation of conspiracy by the City to violate §1983 (Claim 4).

The City has also requested this court extend the reasoning of *Kentucky v. Graham*, 473 U.S. 159 (1985) and dismiss all claims including the 42 U.S.C. § 1983 claim filed against the individual defendants in their official capacities as well as all claims against the Commission and its members.

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14 Fed. R. Civ. P. 12(h)(3) states: "Whenever it appear by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

In *Kentucky v. Graham*, supra, suit was filed against the Commonwealth of Kentucky and several of its agents. The Commonwealth of Kentucky was dismissed as a defendant due to eleventh amendment immunity. The Supreme Court correctly noted that the inclusion of the entity itself as a named party was unnecessary because the liability of an agent in his official capacity is, in reality, liability of the governmental employer. The City reasons that if the action is maintained against the City, the inclusion of the City's agents in their *official* capacities is unnecessary. This court agrees.

Whether the City is named in this suit or not, liability for the acts of its agents and employees performed in their official capacities will be imposed upon the City. That is the clear teaching of Kentucky v. Graham, supra. This court finds that the reverse in also true: i.e., that such liability is imposed when the City is a named defendant whether or not the agents or employees (in their *official* capacities) are named.

Therefore, based upon the reasoning of *Kentucky v. Graham, supra*, this court finds no legal basis for the individual defendants in their *official* capacities or the Commission and its members to remain as parties in this suit.

Accordingly, the City's motion to dismiss all claims against the Commission and its members and all claims against the individually-named defendants in their *official* capacity is granted.

This court however does find that plaintiff has asserted facts sufficient to maintain his 42 U.S.C. § 1983 claim against those defendants sued in their *individual* capacities. Therefore, defendants' motion for summary judgment on this issue is denied as to those defendants.

IV. QUALIFIED IMMUNITY

Defendants seek a ruling that their actions were objectively reasonable as a matter of law and, therefore, that they are absolutely shielded from any liability through the doctrine of qualified immunity.[15] Plaintiff, however, has raised sufficient questions of material fact on this issue to defeat summary judgment. He has alleged that defendants intentionally violated city charter provisions and state

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15 "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also: *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985).

law. The issue of the "reasonableness" of the various defendants' conduct is vigorously disputed as are several critical underlying facts giving rise to plaintiff's reassignment.

These disputed factual issues cannot be resolved absent a testing by the trier of fact of the weight and credibility of the evidence. Given the state of the record, this court cannot find that defendants' conduct was objectively reasonable as a matter of law. *Harlow, supra.*

Therefore, defendants' motion for summary judgment on the issue of qualified immunity is denied.

V. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

Plaintiff contends that his *substantive* due process rights under the fourteenth amendment were violated when he was demoted. However, it is well established that the right to employment is an "entitlement" which is a *property* interest is opposed to a liberty interest. *Punton v. City of Seattle*, 805 F.2d 1378 (9th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). The deprivation of a property interest is a violation of *procedural*, not substantive, due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976).

Plaintiff cites *Loudermill, supra*, for his assertion that a denial of a pre-termination hearing is a per se denial of substantive due process. Plaintiff's reliance, however, is misplaced. The reasoning and holding of that case are based on facts critically different from the facts present here. The Court in *Loudermill* required a pre-termination hearing where the means of a worker's livelihood are *terminated*. The *Loudermill* Court balanced the private interests in "retaining employment" on the one hand and the "governmental interest in the expeditious *removal* of employees and avoidance of administrative burdens, and the risk of erroneous termination" on the other. *Id.* at 542-43 (emphasis added). The key phrase in the balancing test for the *Loudermill* Court was "retaining employment". This is made clear in Justice Marshall's concurring opinion when he agreed that a pre-termination hearing was required *"before the decision is made to terminate an employee's wages." Id.* at 548 (emphasis in original concurring opinion).

As noted previously, neither plaintiff's employment nor his

wages were terminated. He was allegedly not given the procedural protections which the city charter ensured him. This is clearly an allegation of a *procedural* violation.

Plaintiff has also claimed that his right to equal protection of the laws has been violated. It is well established that the equal protection clause of the United States Constitution[16] requires similar treatment for all persons similarly situated. *Hoffmann v. United States*, 767 F.2d 1431 (1985). Plaintiff claims that he was not given certain benefits which were due him. He is not alleging that he was placed in an inappropriate class of city agency heads nor that he was singled out from others in his class. Plaintiff's claims are thus for denial of due process. There is simply no equal protection claim stated here. *See*, e.g., *Constitutional Law*, Second Edition (1984) by John E. Nowak, Ronald D. Rotunda and J. Nelson Young, Chapter 16.

Therefore, the defendants' motion for summary judgement as to the plaintiff's allegations of violations of substantive due process and equal protection of the law found in Claim 1 is granted.

VI. MOTION TO DETERMINE STATUS OF KEKUNA

Plaintiff moves for summary judgment to determine as a matter of law that Kekuna was never lawfully appointed to the position of Deputy Director-Designate.

Under Hawaii Rev. Stat. § 128-3(d), the State Civil Defense Director shall, "with the approval of the county council," appoint a deputy director to head the county civil defense agency. Those deputy directors are subject to Chapter 76 of Hawaii Revised Statutes (Civil Service Laws).[17] An appointment of an assistant to the deputy director

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16 U.S. Const. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

17 §128-3(d) provides in relevant part:

> The director shall, with the approval of the county council, appoint for each political subdivision a deputy director who may be removed by the director. . . . Chapter 76 shall apply to full-time deputy directors.

may be made if "approved by the director of civil defense." That assistant is also subject to Chapter 76.[18]

Plaintiff contends that the City violated Hawaii Rev. Stat. §§ 128-3(d) and 128-13(1) because neither the mayor (as Deputy Director) nor Kekuna (as Deputy Director-Designate) were approved by the city council or the state director as required nor were they selected pursuant to the civil service process set out in Chapter 76. Further, plaintiff claims Fasi violated Hawaii Rev. Stat. § 128-12 when he "designated" his duties as deputy director to Kekuna because, he argues, *only* the mayor can perform those duties.[19]

The City argues that the mayor has powers granted by the City Charter to manage City agencies (i.e., assign and reassign duties) as he sees fit in order to efficiently carry out the responsibilities of his office. It was under this authority the City claims that Kekuna was appointed, not under the authority of state statute.

Defendants have directed this court to material issues of fact which require this court to deny plaintiff's motion. The issues include: Was Kekuna appointed under state statute or the mayor's general powers of administration as granted by the city charter? This question can only be answered after additional facts surrounding that appointment are deduced at trial.

Therefore, plaintiff's motion is denied.

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18 Hawaii Rev. Sta. § 128-13(1) states, in part:

> Each political subdivision shall have the power and authority: (1) Deputy director's staff. To provide, for the deputy director of such political subdivision, an assistant or assistants whose appointments shall be approved by the director of civil defense .... Chapter 76 shall apply to the full-time deputy director or the deputy director's first assistant.

19 Hawaii Rev. Stat. § 128-12 provides, in part:

> The *deputy director* for each political subdivision shall have direct responsibility for the organization, administration, and operation of the local organizations for civil defense, subject to the direction and control of the governor and director of civil defense, and subject to the assumption of direct operational control of the governor and director as provided in this chapter. (Emphasis added.)

VII. MOTION TO DISMISS PUNITIVE DAMAGES

Plaintiff is entitled to recover punitive damages only upon a showing that the conduct of the defendants was reckless or they acted with callous disregard for the rights of others, *Smith v. Wade*, 461 U.S. 30, 51 (1983), or for conduct which shows gross negligence, actual malice or criminal indifference, *Protectors Alpha Nav. v. N. Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985).

Plaintiff has alleged, through his affidavit and various written submissions, that the conduct of the defendants in demoting him without notice or cause evidenced such intent. However, defendants, by their own depositions, have denied those allegations.

For purposes of this motion, this court must accept the evidence submitted by plaintiff as true as well as any reasonable inferences drawn therefrom. *T.W. Elec.*, 809 F.2d at 631.

There are clearly issues of material fact raised here regarding the intent of the parties. There can be no ruling by this court as a matter of law that defendants did not act with the intent required for an award of punitive damages.

Therefore, this motion is denied.

VIII. DEFAMATION

On January 7, 1985 and October 11, 1985, Anderson issues memoranda regarding Kekuna's taking over at OCDA. On February 20, 1985, a confidential memorandum was released to the *Honolulu Star-Bulletin* by Fasi. In October 85, Fasi, on a KGU radio talk show, made remarks about plaintiff and attributed statements to plaintiff that plaintiff contends he did not make. This conduct forms the bases for the defamation allegations found in Claim 12 of both complaints.

Although plaintiff includes all defendants in his defamation claims, he only alleges that statements were made or published by Kekuna, Fasi and Anderson. Fukuda is only included in this claim because of her testimony before the Commission.

Federal law applies to this first amendment claim. *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (1988). This circuit has often relied on the *Restatement (Second) of Torts* in this area. See e.g., *Lewis v. Time Inc.*, 710 F.2d 549 (1983); *Ault v. Hustler Magazine*, Inc., 860 F.2d 877 (1988). *The Restatement (Second) of Torts*, Section 559 defines a communication as defamatory when it tends to "harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him."

The statement must be asserted as the truth and not merely opinion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 40 (1974); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980). If the statement made is one of opinion, the plaintiff's claim as to that statement must fail. *Leidholdt*, 860 F.2d at 893; Ault, 860 F.2d at 880-81.

Plaintiff argues that opinions, while not generally actionable, may still be actionable if those opinions imply facts which are unknown to the reader or listener. He cites the *Restatement (Second) Torts*, Section 566 which states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed *defamatory facts* as the basis for the opinion. (Emphasis added.)

Plaintiff asserts that, since Fasi, Anderson and Kekuna were aware of facts to which the readers and listeners did not have access, their opinions expressed are actionable per se under the Restatement.

However, this is not what the cited rule states. The "undisclosed" facts implied must be *defamatory*. Plaintiff does not allege that any of the underlying undisclosed facts are defamatory; he simply states that they are undisclosed. Again, this does not satisfy plaintiff's duty under Rule 56. *Anderson, supra.*

Further, if plaintiff was a public figure at the time the alleged false statements were made, he must also show that those statements were made with "actual malice." *Leidholdt, supra*, at 893; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 80 (1964). Plaintiff admits that he is a public figure. He was the head of a state agency and its media representative. As evidenced by the numerous news articles and other documents submitted by all parties, he placed himself and this issue before the public in an effort to assist his cause. He cannot, and does not, deny that he has "thrust [himself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

As noted above, because plaintiff was a public figure, he must show "actual malice" if he is to prevail and he must do so with "clear and convincing clarity." To prove actual malice, plaintiff must show that defendant made the defamatory statement, if any, "knowing that

it was false" or "with reckless disregard of whether it was false or not." *Fong v. Merena*, 66 Hawaii 72, 74 (1982); *Hoke v. Paul*, 65 Hawaii 478, 481 (1982); *Rodriguez v. Nishiki*, 65 Hawaii 430, 436 (1982); *Tagawa v. Maui Publishing Co.*, 50 Hawaii 648, 652 (1968), *cert. denied*, 396 U.S. 822 (1969). *See* also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Dworkin v. Hustler Magazine*, No. 87-6393, slip. op. filed January 26, 1989 (9th Cir.).

Therefore, for plaintiff's claims of defamation to withstand summary judgment, they must meet three requirements. They must: 1) be arguably defamatory; 2) be asserted as the truth; and 3) have been made with "actual malice." In construing suspect statements, the words and implications arising therefrom are to be "given their natural and obvious meaning." *Costello v. Capital Cities Communications*, 505 N.E.2d 701 (Ill. App. 5. 1987); *Ollman v. Evans*, 750 F.2d 970 (D.C.Cir. 1984).

A. STATEMENTS

1. Statements by Kekuna

On February 20, 1985, Fasi released to the *Honolulu Star-Bulletin* newspaper a confidential memorandum entitled "Organizational Analysis" prepared by Kekuna and addressed to Fasi which plaintiff says "represented that Plaintiff isolated himself from other staff members, failed to adequately upgrade emergency preparedness plans, failed to communicate with staff members on crucial matters, and gave preferential treatment to certain staff." (Complaint, p. 38.) the memorandum is dated January 31, 1985 and was prepared by Kekuna to offer his observations of the civil defense agency after heading OCDA for one month.

(a) The "Management" section of the memorandum began: "There is an obvious difference in management style between my predecessor and myself." He further suggested the actions taken by plaintiff in down-grading the Asst. Administrator's position "appear to have been taken with the intent of isolating the 'Administrator's' position [and the incumbent] into one of necessity to the agency. . . ."

There is simply nothing in the ordinary meaning and/or implications of these remarks that a jury could find to "lower [plaintiff] in the estimation of the community or deter third persons from associating or dealing with him." *Fernandez*, 65 Hawaii at 228. Further, these statements are clearly opinion as opposed to truth. *Gertz, supra.* Kekuna even referred to this difference between them as "manage-

ment style." As a matter of law, publishing this non-defamatory opinion of Kekuna does not constitute actionable defamation.

(b) The statements regarding standard operating procedures are as follows: "Before accepting this job I knew this area needed attention. . . . In essence, attention has not been given to annually reviewing these documents and updating them as necessary for so many years that it would require a major rewrite to make them current. My predecessor realized this and budgeted $45,000 for FY 85-86 to hire two planners for this purpose." He also said that "[i]t appears that [plaintiff] did not assume [the] responsibility" in the development of preparedness plans for natural disasters.

Again, there is no basis for a reasonable jury to find that these statements are defamatory under the Fernandez and Gertz standards. In fact, the statement that plaintiff also recognized the problem in this area and budgeted monies to correct it could be seen as reflecting positively on plaintiff.

(c) Essentially, the statements regarding failure to keep other staff members informed are found in the discussion above under isolation and "management style" and in the "Budget" section of the memorandum. In the "Budget" section, after noting that "[t]his item seems to have been well-planned and coordinated with budget personnel," Kekuna concludes: "The only area of concern here was stated in my previous discussion under 'Management' - keeping others informed."

As a matter of law, there is nothing defamatory in these statements.

d) Kekuna wrote: "There is evidence of loyalty to my predecessor by one individual. There is also evidence that this individual was given preferential treatment by my predecessor. I cannot prove these statements and therefore can only use caution in checking work accomplished by this individual."

Taken as a whole and given plaintiff's status as a public figure, this statement does not constitute legal defamation.

2. Statements by Fasi

On a radio talk show, in response to a caller's charge that plaintiff's demotion was "illegal", plaintiff alleges that Fasi stated plaintiff "botched Hurricane Iwa" and that he was incompetent. Plaintiff also alleges that Fasi attributed statements to plaintiff that were untrue.

(a) Fasi said of plaintiff ". . . as far as I'm concerned, botched

up the whole Iwa Hurricane situation." This clearly is Fasi's own opinion. This court finds that the phrase "As far as I'm concerned" is equivalent to "In my opinion". Statements which appear to be "fact" are not actionable if they are in fact opinions and made in "heated political debate." *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987).

Not only is this statement opinion rather than fact, it was made after an accusation that the demotion was "illegal" and during a time when plaintiff's removal was a major media/political event. As a matter of law, it is not defamatory.

(b) Plaintiff equates the statement above with calling him "incompetent". This court's conclusion above applies here as well.

(c) Fasi stated that he had a letter from plaintiff to Fasi in which plaintiff "castigates the incompetence, the wrongdoing, the complete inability of" General Lum, who is the head of the State Civil Defense Organization. Further, Fasi said plaintiff "in effect was saying that General Lum" is incompetent.

Truth is an absolute defense to a charge of defamation. *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485, 525 (1984). The January 2, 1985 memorandum from plaintiff to which Fasi was referring stated, in part:

> 1. I regret to report that the single most important problem affecting (OCDA) ability to carry out its public safety mission in the most effective manner is the impeditive and intransigent attitudes of and actions/ inactions by the State Director of Civil Defense, along with his Vice Director and Chief of the Plans and Operations Branch.
>
> 2. The excellent harmonious working relationships which existed between OCDA and State Civil Defense during your previous administration deteriorated seriously starting late in 1981 with the assignment of the present incumbents of the aforementioned positions. These individuals have attempted to change the policies and procedures in effect in the city during your administrations.

> 3. Despite our best efforts to restore good relations and clarify City and State roles, all attempts to arrange a modus vivendi, while protecting the interests and prerogatives of the City and County, have proved futile.
>
> 4. Continued failure by State Civil Defense to render proper support to the City and County seriously jeopardizes the safety of Oahu residents.

Fasi cannot be charged with defamation if what he said was true. As this memorandum shows, Fasi was in substance accurately relating the import of plaintiff's remarks. There is no defamation here.

3. Statements by Anderson

Plaintiff claims that Anderson, "in so many words and/or by innuendo" stated that plaintiff's continued administration of OCDA "was a threat to public safety, thereby implying that Plaintiff lacked the ability to perform the duties of administrator. . . ." (Complaint, p. 38.)

Anderson wrote a January 7, 1985 memorandum to all employees of OCDA stating that they were to look to Kekuna for guidance and direction in their duties at the agency. In a January 7,1985 news release, he outlined the struggle between the state and City civil defense agencies and concluded that this mutual "lack of confidence" constituted a jeopardy to the citizens of Oahu.

As seen above, plaintiff himself reached the same conclusion in his January 2nd memorandum to Fasi. He certainly cannot now claim that the same statement by Anderson is defamatory. The record before this court does not support the allegation that Anderson placed the blame on plaintiff. He merely pointed out the problem and indicated what the mayor could do to solve it: replace the head of OCDA.

On October 11, 1985, Anderson testified before the Civil Service Commission that it was his opinion at the time of plaintiff's demotion that plaintiff was not subject to the civil service rules. Those who testify before a Civil Service Commission are "absolutely immune from suits for damages arising out of their testimony." *Lentsch v. Marshall*, 741 F.2d 301, 304 (9th Cir. 1984). There is no legal basis for a claim of defamation as to these statements.

4. Statement by Fukuda

Defamation has also been alleged against Fukuda for her testimony before the Civil Service Commission as to her opinion that plaintiff's position was not civil service. For the same reason noted above, this testimony is absolutely shielded from liability. *Lentsch, supra.*

B. MALICE

Plaintiff cannot simply stand on his pleadings or assert that he will discredit defendants' testimony at trial on this issue of malice if he is to avoid summary judgment. *T.W. Elec., supra.* He has the affirmative obligation to come forward with significant probative evidence which tend to support his allegations. *Commodity Futures, supra.*

In this case, however, plaintiff has failed to provide a sufficient basis for his general contention that defendants acted with actual malice or reckless disregard in making the specific statements complained of. Plaintiff simply relies on his own conclusions drawn from defendants' ultimate conduct. These include the "fact" that he was demoted and that George Kekuna replace him. Plaintiff surmises this proves the statements, some of which were made after Kekuna replaced him, were made solely as a "cover-up" and that the defendants clearly did not believe them to be true.

This court finds that, taken together, a reasonable jury could not find "actual malice" or "reckless disregard for the truth" based on these "facts" alone. *Anderson, supra.*

For all of the reasons set forth above, summary judgment on Claim 12 (defamation) is granted in favor of all defendants.

IX. MOTION TO ABSTAIN, STAY OR DISMISS PROCEEDINGS

The gravamen of plaintiff's remaining allegations fall into two categories: (1) a violation of plaintiff's procedural due process rights giving rise to a claim under 42 U.S.C. § 1983 against the individual defendants in their personal capacities; and (2) numerous pendent state claims against all defendants. Although other grounds have been submitted to this court as bases for staying these proceedings, due to the nature of the remaining allegations, this court will first consider whether the doctrine espoused in *Parratt et al. v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986), and its progeny is applicable.

The Court in *Parratt* quoted *Bonner v. Coughlin*, 517 F.2d 1311 (CA7 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978), with approval and adopted its conclusion in procedural due process cases stating:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into pay, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole of any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the fourteenth Amendment.

517 F.2d at 1319.

The *Parratt* Court held that the plaintiff had proven that a deprivation of procedural rights had occurred because of the state agents' failure to follow established state procedure.[20] It further found that the state had provided a remedy to persons "who believe they have suffered a tortious loss at the hands of the State." 451 U.S. at 543. Relying on *Bonner* and *Ingraham v. Wright*, 430 U.S. 651 (1977)[21],

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20 The Parratt reasoning does not apply to cases in which the deprivation of property is caused by conduct *pursuant* to established state procedure. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). However, such is not the case here.

21 *Ingraham* involved a claim that corporal punishment in public schools violated due process. The Court reached the same conclusion even though the act complained of was an *intentional* deprivation of a *liberty* interest as opposed to a negligent deprivation of a property interest.

the Court found that, even though state action was involved and the plaintiff's procedural rights were violated, the existence of the state's post-deprivation procedures satisfied the requirements of due process.

The Court went on to set forth the plaintiff's argument that state procedures did not adequately protect his interests as compared to a § 1983 action "because it (the state procedure) provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury." *Id.* at 543 44. However, the Court refused to require that the state procedure be able to remedy all of plaintiff's alleged losses.

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

Id. at 544.

Finally, the Court summarized the reasoning of its refusal to hold every tort or violation committed "under color of state law" actionable under § 1983.

> Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Id. at 544.

As Justice Stewart observed in his concurring opinion:

> "[E]ven if Nebraska has deprived the respondent of this property in the constitutional sense,

> it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the fourteenth Amendment requires in this context.

Id. at 545.

The holding and reasoning of *Parratt* were specifically extended in *Hudson v. Palmer*, 468 U.S. 517, 533 (1983), to cover *intentional* acts as well as negligent ones. The *Hudson* Court also restated the rule: "that [plaintiff] might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." *Id.* at 535 (citing *Parratt*, 451 U.S. at 544).

In footnote 14 at 533-34 of the Court's opinion, the Court recognized that this reasoning is equally valid when plaintiff is deprived of a property "interest" as well as physical property when it refers to *Ingraham, supra*, as the case which "foreshadowed" its ruling in *Hudson*.

Contrary to plaintiff's argument, in this case a "random and unauthorized" act, for purposes of *Parratt*, is defined as one contrary to commission regulations or city charter rules. *Hudson*, 468 U.S. at 533. That is precisely what plaintiff has alleged.

It is equally clear that the *Parratt* doctrine applies in civil cases as well and prisoner/criminal cases. *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986).

Although the holdings of *Parratt* and the cases that follow it (that procedural due process is not violated provided the state's legal system as a whole provides a constitutionally acceptable set of remedies) are not looked upon with favor by all legal writers,[22] it represents the current state of the law.

In this case, we have claims of negligent or intentional violations (depending on which alternative version of plaintiff's claims are accepted as true) of plaintiff's procedural due process rights relating to his property interest (freedom from demotion except for cause). (*Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1986) *cert. denied*, 481 U.S. 1029 (1987).) The City has a system, the Civil

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22 See: e.g. American Constitutional Law, Second Edition (1988) by Laurence H. Tribe. Chapter 10, § 10-14.

Service Commission, specifically designed to provide remedies to plaintiff for those violations. He has taken advantage of that system and its process is now pending. The question for this court becomes whether, on the facts of this case, the City's civil service system is sufficiently adequate to preclude plaintiff from bringing this § 1983 action for those same violations?

As noted above, the final commission decision was entered eleven months after plaintiff filed his appeal of his demotion. Although plaintiff argues that this delay amounts to a denial of a timely hearing, this court cannot find as a matter of law that it is one of constitutional proportions. *Loudermill*, 470 U.S. at 547. This court takes judicial notice of the fact that it is not uncommon for actions brought before Boards, Commissions and state and federal courts to take many months or even years before a hearing is held and a decision rendered. Were this delay to be a basis for an action under 42 U.S.C. §1983, the federal courts would be inundated with such actions because delay of some duration is the unfortunate rule in these proceedings rather than the exception.

Further, as the procedural history indicates, plaintiff is responsible for at least a share of the delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term "due process". Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient.

Once the Hawaii State Supreme Court has issued its decision on plaintiff's current appeal, the Civil Service Commission will be in a position to conduct a hearing and, if plaintiff prevails, has the power and authority to reinstate plaintiff in his prior position "under such conditions as it deems proper". Revised charter of the City and County of Honolulu. Section 6-308(2). As noted above, the fact that plaintiff may not be able to recover additional remedies available under § 1983 (i.e., damages for emotional distress, punitive damages, etc.) is not determinative of this issue if the remedies available are otherwise adequate. *Parratt, supra*, and *Hudson, supra*.

The state system also provides for appeal of commission decisions to the state courts, a process with which all parties to this case are familiar.

The court makes special note of *Punton v. City of Seattle*, 805 F.2d 1378 (9th Cir. 1986) *cert. denied*, 481 U.S. 1029 (1987), a case from this circuit with facts similar to those found here. In *Punton*, a member of the Seattle police department was summarily dismissed from his job without a hearing or being advised of the charges against him prior to his dismissal. upon appeal to the Seattle Public Safety Civil Service Commission, the Commission simply affirmed the dismissal without reaching the constitutional due process questions.

Punton appealed to the King County Superior Court where it was found that, due to the absence of pre-termination notice and hearing, Punton's due process rights were violated. The court found that Punton was entitled to reinstatement with back pay and was awarded attorney's fees. The Washington Court of Appeals affirmed the reinstatement but reversed the attorney's fees award. The court held that Punton was entitled to only those remedies available in the administrative proceeding and those remedies did not include attorney's fees.

Prior to the decision by the Washington State Court of Appeals, Punton filed a 42 U.S.C. § 1983 claim in U.S. district Court seeking emotional distress damages and attorney's fees for his constitutional deprivations. Summarizing the facts of that case, the district court stated:

> In this case, the undisputed facts are that Punton lost his job without any kind of a hearing. He immediately complained, received a civil service hearing, and *in due course*, was reinstated with back pay. By resorting to post-deprivation state court process, he received everything he had lost, but he did not receive supplemental damages for emotional distress or attorney fees. The crucial question, therefore, is whether Punton, who after losing his job, obtained the incidental relief afforded by the law that created his job, is now entitled to additional relief in federal court under §1983, for damages not available in state court under the type of procedure that he chose to follow. (Footnote omitted). In short, the question properly before the district court, was whether or not Punton is entitled to something more and, if so, what more. (Emphasis added.)

805 F.2d at 1380.

The only difference between *Punton* and this case is that the city system here has not yet reached a final conclusion. That process is still pending and, as noted above, the only conclusion reached thus far (the civil service issues) was in plaintiff's favor. Therefore, this court is not in a position to determine that the delay of which plaintiff complains is so long or so unreasonable that it requires a finding that the entire city system is constitutionally defective. While the system established to remedy plaintiff's grievances has not run its course, this court takes the teachings of *Punton* to mean that, as long as that system is working and is not fundamentally deficient, plaintiff has not been deprived of the due process that system affords.

Therefore, under *Parratt* and its progeny, especially *Punton*, the remaining portions of plaintiff's federal complaint (Civil No. 86-1136) must be dismissed without prejudice.

The issues in the state court complaint (Civil No. 88 00375) remaining after this order are based on alleged violations of state law, the Revised Charter of the City & County of Honolulu and 42 U.S.C. § 1983. The § 1983 claim found in that complaint is capable of being heard in state court and is based on the same alleged violations which make up his other state claims. While this court is compelled to dismiss the federal complaint as discussed above, it is the court's finding that, if plaintiff is to have an adequate remedy available to him in the state forum and an opportunity for the full reaches of the due process justice requires, he must be allowed to pursue his additional claims in the state court.

Based upon the discussions elsewhere in this order, it is also clear to this court that, although plaintiff was not prohibited from filing a complaint here, his case more appropriately belongs in the state court system.

Plaintiff has argued that he would be disadvantaged if he is not allowed to proceed in this court and must resort to the state court and Civil Service Commission for relief. It is evident that the state system, the Civil Service Commission and subsequent state court review, provides adequate redress for plaintiff's complaints. Because the § 1983 claims are based on a deprivation of *procedural* due process, that post-deprivation process given to plaintiff affords him more than sufficient due process. *Parratt, supra*, et al.

As noted previously, U.S. District Judge Ideman issued a stay before plaintiff had charged the members of the Commission with

bias against him. Judge Ideman based that stay on the rationale of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). He found that plaintiff's claims involved unsettled questions of state law which, when settled, would obviate the necessity of deciding federal constitutional issues. He further ruled that the state courts should be given the opportunity to make those decisions. Thereafter, plaintiff challenged the make-up of the Commission itself which resulted in the appeal to the Hawaii State Supreme Court which is still pending. After that challenge was originally made and in order to avoid Judge Ideman's stay, plaintiff filed his state court complaint which was subsequently removed to this court.

What Judge Ideman was facing when he lifted the stay was a charge of bias of the Commission and a recently filed state complaint which also included a claim of bias. On May 23, 1988, Judge Ideman vacated his stay because, under the circumstances existing at that time, he was not convinced that the commission could provide plaintiff with the full relief he was seeking. However, with the severance of Civil 88-00375 and its remand to state court, plaintiff will now have available to him both the commission proceeding and his state court action and will have the opportunity to present his pending claims and obtain all the relief to which he may be entitled.

This court has the discretion to remand the remaining portion of Civil NO. 88-00375 *sua sponte*. *Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987); *cert. denied., Psgroup v. United States District Court for the Southern District of California*, U.S. , 108 S.Ct. 1732 (1988). Accordingly, based upon the foregoing, the order consolidating Civil No. 86 1136 and Civil No. 88-00375 filed September 6, 1988 is dissolved; that portion of Civil No. 88-375 remaining after the disposition of the motions herein is remanded to the state court for further proceedings; and, that portion of Civil No. 86-1136 remaining after the disposition of the motions herein is dismissed without prejudice.

X. MOTION FOR RULE 11 SANCTIONS

Defendant Fukuda moves for Rule 11[23] sanctions against plaintiff's counsel for : 1) including Claim 7 (implied covenant of good faith and fair dealing) in his complaints; and, 2) refusing to eliminate the claim when such a demand was made by defendant's counsel.

Although there is no legal basis in Hawaii for this cause of action, this court does not find its inclusion in these complaints an appropriate basis for invoking Rule 11 sanctions under present criteria set forth by the Ninth Circuit Court of Appeals. Being only one of fifteen and seventeen claims respectively, defendants have made no showing of prejudice in time or expense occasioned by the addition of this claim. Certainly, it should not have been included and must now be removed. However, given this lack of showing of prejudice to defendants, this court finds Rule 11 sanctions inappropriate here.

Defendants' Motion for Rule 11 Sanctions is therefore denied.

CONCLUSION

Based on the above legal and factual discussion and conclusions and the authorities cited herein, this court orders as follows:

(1) The following motions filed in these consolidated cases are determined as follows:[24]

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23 Fed. R. Civ. P. 11 is designed to insure the accuracy of pleadings and to insure that the content of pleadings are not designed to harass or delay: i.e., they are well grounded in law or in fact. That portion of the rule relevant to defendant's motion is as follows:

> . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

24 As noted above, all defendants have either authored or joined in all other defendants' motions. Therefore, the disposition of each of these motions is equally applicable to all defendants. Furthermore, the disposition of these motions are equally applicable to both Civil No. 86-1136 and Civil No. 88 00375.

(a) Plaintiff's Motion for Partial Summary Judgment feild August 15, 1988 as to Claims 1, 2 and 3 (issue: civil service) is GRANTED;

(b) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claim 3 is DENIED;

(c) Defendant City's Motion for Partial Summary Judgment filed August 16, 1988 as to Claims 1, 2, 3, 4, 6, 7, 10, 11, 12, and 13 (that portion relating to breach of contract) on behalf of all defendants in all capacities is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 1 (that portion relating to substantive due process and equal protection), 6,7, 10, 11 and 12 as to all defendants in all capacities;

(ii) this motion is GRANTED as to Claims 2 and 4 as to the City, the Civil Service Commission and all individual defendants in their *official* capacities;

(iii) the remainder of this motion is DENIED.

(d) Plaintiff's Motion for Partial Summary Judgment filed January 4, 1989 as to Claims 1, 2, 3 and 14 (issue: Kekuna unlawfully appointed) is DENIED;

(e) Defendant Anderson's Motion to Stay Proceedings or To dismiss filed January 6, 1989 is GRANTED as set forth under No. (4) below;

(f) Defendant City's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) those parts of this motion dealing with the delay of the Civil Service Commission, defendant Harris, the applicability of Hawaii Rev. Stat. Chapter 76 to the City & County of Honolulu and Claim 4, 9 and 13 (that portion relating to breach of contract) are GRANTED;

(ii) the remainder of this motion is DENIED.

(g) Defendant Anderson's Motion for Summary Judgment in his individual capacity filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12, and 13 (that portion relating to breach of contract);

(ii) the remainder of this motion is DENIED.

(h) Defendant Anderson's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to Claim 12 is GRANTED;

(i) Defendant Fasi's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to Claim 12 is GRANTED;

(j) Defendant Fasi's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12 and 13 (that portion relating to breach of contract);

(ii) this motion is GRANTED as to Claims 2 and 4 in Fasi's official capacity;

(iii) the remainder of this motion is DENIED.

(k) Defendant Fukuda's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12 and 13 (that portion relating to breach of contract);

(ii) the remainder of this Motion is DENIED.

(l) Defendant Fukuda's Motion for Rule 11 sanctions filed January 17, 1989 is DENIED;

(m) Defendant City's Motion to Dismiss Civil Service Commission and its members and all individuals in official capacities filed January 25, 1989 is GRANTED;

(n) Defendant Fukuda's Cross-Motion for Summary Judgment filed January 27, 1989 as to all claims except Claim 12 is DENIED.

(o) All motions or parts thereof not specifically identified in this list are hereby DENIED;

(2) The order consolidating Civil No. 86-1136 and Civil NO. 88-00375 dated September 6, 1988 is DISSOLVED;

(3) That portion of Civil No. 88-00375 remaining after disposition of the motions as set forth herein is REMANDED to the state court for further proceedings; and,

(4) That portion of Civil No.86-1136 remaining after disposition of the motions as set forth herein is DISMISSED without prejudice, all parties to bear their own costs.

(5) Those cross-claims filed against the City for contribution and indemnity are reserved for determination in the state court proceedings.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii March 3, 1989.

David A. Ezra (signed)

UNITED STATES DISTRICT JUDGE

Malcolm A. Sussel v. City and County of Honolulu, et al.; Civil Nos. 86-1136 and 88-00375; DECISION ON PLAINTIFF'S AND DEFENDANTS' VARIOUS MOTIONS FOR SUMMARY JUDGMENT, TO DISMISS, TO STAY PROCEEDINGS, AND FOR OTHER RELIEF

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL,

CIVIL NOS. 86-1136
88-00375

Plaintiff,
vs.
CITY AND COUNTY OF HONOLULU,et al.

Defendants.
April 21, 1989

ORDER GRANTING IN PART AND DENYING IN PARTPLAINTIFF'S AND DEFENDANTS' MOTIONS FOR RECONSIDERATION, DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO SET CASE FOR TRIAL, FOR DISMISSAL OF CERTAIN CLAIMS AND FOR REMAND

I. MOTIONS FOR RECONSIDERATION

Plaintiff and several defendants have requested reconsideration of this court's Decision on Plaintiff's and Defendants' Various Motions for Summary Judgment, to Dismiss, To Stay Proceedings, and For Other Relief filed March 3, 1989 (hereinafter "March 3 Decision").[1] Careful consideration has been given to each of the various arguments, both factual and legal, made in support of these

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1 On March 16, 1989, Defendant Fasi filed a Motion For Reconsideration, Alteration, Amendment and/or Clarification of this court's "March 3 Decision" which is joined by defendants Kekuna, Fukuda and Anderson and opposed by plaintiff and, in part, by defendant City. On March 17, 1989, plaintiff filed a Motion For Reconsideration and/or Clarification of that "March 3 Decision" which is opposed by all defendants. A detailed statement of facts and claims is found in the "March 3 Decision" at pp. 1-9.

motions. Except as specifically indicated below, plaintiff's and defendants' motions for reconsideration are DENIED for the reasons set forth in the "March 3 Decision". The court further finds as follows:

A. *Plaintiff's January 16, 1989 Motion for Partial Summary Judgment Omitted From "March 3 Decision"*

Plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 was not separately addressed in the "March 3 Decision". However, the issues contained in that motion were disposed of by the rulings as to plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claims 1, 2 and 3 and the City's Motion to Dismiss or For Summary Judgment filed January 17, 1989. (*See*: "March 3 Decision", p. 50 at ph. (1)(a) and p. 51 at ph. (1)(f)(i)).

Therefore, in accord with that portion of the "March 3 Decision" finding that plaintiff was a civil service employee while Administrator of OCDA, plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 is GRANTED.[2]

B. *Defendants' claim That Findings Regarding The U.S. Constitution Are Res Judicata As To State Constitutional Issues*

Defendants argue that plaintiff's claims of violation of the equal protection and due process clauses of the Hawaii State Constitution must be dismissed because this court found no violation of, and thus dismissed claims premised upon, the due process and equal protection clauses of the United States Constitution.[3] Defen-

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2 That finding was based on the City's civil service rules. Plaintiff claims it should also be based on state law. However, this court specifically finds that Chapter 76, Hawaii Revised Statutes, does not apply to the City and County of Honolulu. *Gibb v. Spiker*, 68 Hawaii 438, 718 P.2d 1076, 1079 (1986) ("[T]he City and County of Honolulu does not appear subject to HRS Chapter 76."). Further, as plaintiff has stated: "Chapter 76 of the Hawaii Revised Statutes . . . does not constitute the basis upon which Plaintiff is presently asserting his arguments to civil service coverage." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment filed August 27, 1988, p. 59.)

3 "March 3 Decision" at pp. 23-25.

dants contend that ruling is res judicata as to plaintiff's alleged state constitutional claims in state court. While defendants may be correct, this determination is more properly within the province of the state courts after remand. Defendants' motion must therefore be denied.

C. *Clarification Regarding Reference To Corporation Counsel Opinion Reaffirming Civil Service Status*

Page 3 of the "March 3 Decision" states: "In addition, in December 1984, the Corporation Counsel, legal advisor to the City, restated an earlier opinion that the Administrator's position was in fact subject to civil service commission rules." On page 13 of the "March 3 Decision", it is noted: "As previously indicated, in 1984, the Corporation Counsel again reaffirmed its opinion." The specific date of the opinion referred to is in error.

The initial Corporation Counsel opinion is correctly stated as October 22, 1981. ("March 3 Decision" at 13). However, the confirming Corporation Counsel opinion referred to above was dated August 13, 1982, not December 1984. This, however, in no way alters or affects the court's reasoning or conclusions.

Nonetheless, the correct date of that Corporation Counsel opinion should be noted.[4]

D. *Qualified Immunity Issue Is Now Moot*

Defendant Anderson contends that, with the dismissal of the 42 U.S.C. § 1983 claims, the issue of qualified immunity is now moot. In the alternative, he claims this court applied an erroneous legal standard in denying defendants' summary judgment motions on this issue.

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4 The December 1984 opinion regarding plaintiff's civil service status was via a telephone call from Wallace Y. Kunioka, then Director of Civil Service of the City and County of Honolulu, to defendant Fasi. His statement is found in his affidavit dated August 25, 1988 at page 4, paragraph 10, which is attached as an exhibit to Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment dated August 27, 1988. Mr. Kunioka's statement reads: "I told Frank F. Fasi in a telephone conversation in late December 1984 that Malcolm Sussel as Administrator of OCDA was a civil service employee. Mr. Fasi said in response to me, 'We'll see about that'."

While this court is confident that the correct legal standard was applied, it nevertheless agrees that a determination of this issue has now been rendered moot. As correctly noted by Anderson, the issue of qualified immunity is irrelevant to the remaining pendent state tort claims. The related legal standard for those claims is respondeat superior which was not an issue raised in these motions. Therefore, that portion of this court's "March 3 Decision" relating to the issue of qualified immunity is withdrawn and the issue declared moot.

E. *Dismissal of 42 U.S.C. § 1983 Claims Of Civil No. 88- 00375*

Following the *Parratt* doctrine, this court dismissed the 42 U.S.C. § 1983 claims found in Civil No. 86-1136.[5] (*See: Parratt v. Taylor*, 451 U.S. 527, 542 (1981) and *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975)). Defendant Fasi argues that the same reasoning applies equally to plaintiff's 42 U.S.C. § 1983 claims in Civil No. 88-00375. This court agrees. Accordingly, the 42 U.S.C. § 1983 claim (Claim 2) and the claim of conspiracy to violate 42 U.S.C. § 1983 (Claim 4) of Civil No. 88-00375 are hereby dismissed without prejudice.

F. *Defendants' Requests Re: Timing And Sequence of State Proceedings*

Defendant Fasi requests an order requiring plaintiff to complete the City civil service commission proceedings before continuing with his state court litigation. Defendant Anderson submits that this court should make it clear that it is not attempting to impose such a requirement.

It would be wholly inappropriate for this court to attempt to impose its own sense of timing or sequence of proceedings upon the state court or Civil Service Commission. These decisions are appropriately within the province of those state and city forums. Defendant Fasi's motion must therefore be denied.

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5 "March 3 Decision" at pp. 38-46.

II.PLAINTIFF'S MARCH 17, 1989 MOTION FOR PARTIAL SUMMARY JUDGMENT

On March 17, 1989, plaintiff filed another Motion for Partial Summary Judgment seeking his reinstatement as Administrator of OCDA based on his demotion "without cause". This motion was filed the same day the order vacating this court's previous remand of all remaining claims to state court was filed. While it is unclear whether these claims were still on remand when the motion was filed, for the following reasons plaintiff's motion is denied.

First, this court's prior order required all dispositive motions to be filed in this case no later than January 17,1989. Plaintiff's motion was clearly filed in violation of that order.

Second, this motion is merely a restatement of plaintiff's prior motion for partial summary judgment on his third claim filed August 15, 1989. In that motion, plaintiff asserted that, as a matter of law,

> "[d]efendants violated the City's civil service laws when the City... [demoted plaintiff] without, among other things, ... (1) ten days prior written notice to him ... *and/or, in the alternative, (2) without just or good cause based upon his competence or ability to perform his duties as Administrator.*" (Emphasis added.)

For reasons set forth in the "March 3 Decision" with respect to the denial of plaintiff's August 15 motion, this motion is also denied.

III. REMAND

Pursuant to the "March 3 Decision" and this order, Civil No. 86-1136 has been dismissed in its entirety. All federal claims and several pendent state claims in Civil No. 88 00375 have also been dismissed. The only issues remaining in Civil No. 88-00375 are premised on state claims. Therefore, pursuant to 28 U.S.C. § 1441 (c) and *Carnegie-Mellon University v. Cohill*, U.S. , 108 S.Ct. 614, 618-19 (1988), the remaining claims in Civil No. 88-00375 after disposition of the "March 3 Decision", as amended by Order dated March 17, 1989 and this order, are remanded to state court.

IV. CONCLUSION

Based upon the foregoing:

1. Plaintiff's and Defendant Fasi's Motion for Reconsideration are GRANTED in the following particulars;

a. Plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 is GRANTED as set forth above;

b. The court's prior ruling on the issue of qualified immunity is WITHDRAWN and the issue declared MOOT;

c. The request for this court to order the timing and/or sequence of subsequent state and city proceedings and for a list of parties and claims remaining is DENIED;

d. Claims 2 and 4 of Civil No. 88-00375 are DISMISSED without prejudice;

2. In all respects except those specifically mentioned in paragraph 1 above, plaintiff's and defendant Fasi's Motions for Reconsideration are DENIED;

3. Plaintiff's Motion for Partial Summary Judgment filed March 17, 1989 is DENIED;

4. That portion of Civil No. 88-00375 remaining after this court's "March 3 Decision", as amended by Order dated March 17, 1989 and this Order, is REMANDED to the state court for further proceedings; and,

5. Plaintiff's Motion to Set Case for Trial filed March 17, 1989 if DENIED as moot.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii _____.

David A. Ezra (signed)
DAVID A. EZRA
UNITED STATES DISTRICT JUDGE

Malcolm A. Sussel v. City and County of Honolulu, et al.; Civil Nos. 86-1136 and 88-00375; ORDER GRANTING PLAINTIFF'S AND DEFENDANTS' MOTIONS FOR RECONSIDERATION, DENYING PLAINTIFF'S MOTION OF PARTIAL SUMMARY JUDGMENT AND MOTION TO SET CASE FOR TRIAL, FOR DISMISSAL OF CERTAIN CLAIMS AND FOR REMAND

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-15652
D/CT#: CV-86-1136-DAE

NO. 89-15697
D/CT#: CV-86-1136-DAE
May 9,1991

MALCOLM A. SUSSEL

Plaintiff-Appellant

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu, JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS, MOISES L. TACAZON; PATRICIA K. Y; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu

Defendants - Appellees

NO. 89-15777
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL

Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu

Defendant - Appellant

NO. 89-15778
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL

Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu

Defendant - Appellant

NO. 89-15779
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL
Plaintiff- Appellee

v.

CITY AND COUNTY OF HONOLULU et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu

Defendant - Appellant

NO. 89-15780
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL
Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al.,

Defendants

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu

Defendant - Appellant

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Filed and entered 12/6/90, amended 2/7/91.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,

No. 89-15652
D.C. No. 86-1136-DAE

Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER
March 7, 1991

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y' ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15780
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,
Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.